ENTERED ON DOCKET

DATE 10-8-93

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

Marilyn A. Hammons,)
)
Plaintiff,)
vs.) Case No. 93-C-86-E
)
Chrysler Corporation,)
)
Defendant.)

FILED

OCT 07 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER OF DISMISSAL

This matter comes on pursuant to the joint motion of Marilyn Hammons, and Chrysler Corporation in which the parties jointly moves this Court pursuant to Federal Rules of Civil Procedure 41 to dismiss this case with prejudice for the reason that the parties have entered into a settlement of the above styled and numbered cause of action.

IT IS ORDERED, by the Court, that the above styled and numbered civil action is hereby dismissed with prejudice to refiling.

DATED this 7 day of ~~September~~ October, 1993.

S/ JAMES O. ELLISON

United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, Plaintiff,	)	
vs.	)	CASE NO. 93 C 575 E
PEARL DAVIS DIXON, and LINDA DAVIS, as Personal Representative for the ESTATE OF VAN E. DAVIS, Defendants.	)	

JOURNAL ENTRY OF JUDGMENT

On this 7 day of October, 1993, the Motion For Judgment By Linda Davis, Personal Representative For The Estate Of Van E. Davis, Against Co-Defendant Pearl Davis Dixon On Cross-Claim And Brief In Support comes on for hearing in its regular order;

The Court finds that Pearl Davis Dixon properly was served herein with the Answer And Cross-Claim of Defendant Linda Davis, Personal Representative Of The Estate Of Van E. Davis, on or about July 23, 1993, requesting Judgment quasi in rem on behalf of Linda Davis as Personal Representative Of The Estate Of Van E. Davis against Pearl Davis Dixon for the balance of the insurance proceeds on file with the Clerk of this Court;

The Court further finds that Pearl Davis Dixon properly was served with said Cross-Claim together with all the other pleadings requesting Default Judgment against her herein on September 10, 1993, including, but not limited to, the Affidavit In Support Of Application In Default Judgment On Cross-Claim And Motion For

Default Judgment, the Entry Of Default By Clerk, the Motion For Judgment By Linda Davis, Personal Representative For The Estate Of Van E. Davis, Against Co-Defendant Pearl Davis Dixon On Cross-Claim And Brief In Support, and Defendant Linda Davis' Application For Default Judgment Against Co-Defendant Pearl Davis Dixon;

The Court further finds that the Clerk of this Court certified and entered herein on August 25, 1993, an Entry Of Default By Clerk which was been served on Defendant Pearl Davis Dixon September 10, 1993, as noted above.

The Court further finds, Orders and Decrees herein, that Pearl Davis Dixon originally was properly served herein by Plaintiff, the Prudential Insurance Company Of America, and that the Court had jurisdiction over her person as a result of said proper service; the Court further finds that, thereafter, Pearl Davis Dixon, as Co-Defendant herein to Linda Davis, was served more than once more than 30 days prior to this date with the Cross-Claim Of Linda Davis Requesting Judgment Against Her Co-Defendant Pearl Davis Dixon; in addition, the Court further finds and decrees that Pearl Davis Dixon is in Default herein, has failed to respond within the proper prescribed time to either the Complaint herein or the Cross-Claim asserted by Co-Defendant Linda Davis, as Personal Representative Of The Estate Of Van E. Davis; the default of Pearl Davis Dixon is, therefore, confirmed, adjudicated, and judgment against Pearl Davis Dixon quasi in rem is appropriate on the Cross-Claim asserted herein by Linda Davis, as Personal Representative of the Estate of Van E. Davis.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that Linda Davis, as Personal Representative of the Estate of Van E. Davis, have and recover Judgment quasi in rem against Pearl Davis Dixon determining and declaring that Linda Davis, as Personal Representative of the Estate of Van E. Davis, is entitled to all of the disputed proceeds on deposit herein with the Clerk of this Court in the sum of $13,194.88 plus interest, less $2,352.80 awarded to Plaintiff for costs and attorney fees; accordingly, Linda Davis, Personal Representative of the Estate of Van E. Davis, is hereby awarded judgment quasi in rem against Co-Defendant Pearl Davis Dixon and is awarded the balance of the remaining proceeds on deposit with the Clerk of this Court in the sum of $10,842.08 plus accrued and accruing interest, less the registry fee provided by Local Rule 67 with disbursement to be as soon as practicable on or after October 21, 1993.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that Linda Davis, Personal Representative Of the Estate of Van E. Davis, is declared to be the appropriate party to receive the proceeds deposited herein by plaintiff to the exclusion of her Co-Defendant Pearl Davis Dixon, and Pearl Davis Dixon is ordered and directed not to assert any claim or claims against said insurance proceeds on deposit with this Court at any future time and is barred from so doing.

IT IF FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the ($10,842.08 plus interest) amount is awarded to Linda Davis, Personal Representative of the Estate of Van E. Davis, to the

exclusion of any and all claims of Co-Defendant Pearl Davis Dixon and that the claims of Pearl Davis Dixon are hereby adjudicated to be inferior and subordinate to the claims of said Co-Defendant Estate.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

LOYAL J. ROACH, III, O.B.A. #7615
Suite 660 - Park Centre
525 South Main
Tulsa, Oklahoma 74103
(918) 587-2544

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHRIS and TRUDY MANER,

Plaintiffs,

vs.

STATE FARM INSURANCE COMPANY, a corporation, and DAVID HALL, an individual,

Defendants.

Case No. 93-C-610-B

O R D E R

Now before the Court is Defendant David Hall's (Hall), Motion to Dismiss (docket #5), filed on July 2, 1993, and Plaintiffs, Chris and Trudy Maner's (The Maners) Motion for Remand (docket #7), filed on July 19, 1993.

The Maners filed this claim in state court on June 9, 1993, against State Farm Insurance Company[1] (State Farm) and Hall, requesting damages for the bad faith breach of State Farm's contract, and the emotional distress State Farm has inflicted upon the Maners. The Maners specifically seek "punitive damages for the oppressive and tortious conduct of the Defendant, as well as any other relief that this court may find just and equitable." The sole allegation in the Maners petition concerning Hall is that "David Hall is a resident of Oklahoma and has been employed by

[1] Defendant states in its answer that the proper party is not State Farm Insurance Company, but rather is State Farm Fire and Casualty Company, but does not argue this fact as grounds for dismissal.

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State Farm Insurance Company as a 'Claims Specialist' at all times relevant to this action."

State Farm filed its Notice of Removal on July 2, 1993, and stated that the "Consent of Defendant Hall to this removal is not required, as Hall is a sham Defendant, named solely by the Plaintiffs' counsel to willfully and maliciously attempt to destroy diversity." On that same date, Hall filed a Motion to Dismiss. The Maners, while not responding directly to the Motion to Dismiss, filed a Motion to Remand, arguing that complete diversity does not exist, and that State Farm sought the dismissal of Hall to "create the predicate for federal jurisdiction." The Maners also assert that this Court does not have jurisdiction to determine the Motion to Dismiss because complete diversity does not exist.

State Farm alleges that Hall was improperly and fraudulently joined as grounds for removal. It bases removal on 28 U.S.C. §1441 (a) and (b), which provide in pertinent part as follows:

> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties, or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought. (emphasis added).

The court has jurisdiction to determine if removal was proper because of the alleged fraudulent joinder. *See*, Fine v. Braniff Airways, 302 F.Supp. 496 (W.D. Okla. 1969).

The sole issue before this court, then, is whether a claim is pled, or whether there is a claim against defendant Hall. If there is no claim, or one is not pled, Hall must be dismissed and the

Motion to Remand must be denied. The joinder of a defendant "against whom no cause of action is pled, or against whom there is in fact no cause of action, will not defeat removal." Dodd v. Fawcett Publications, Inc., 329 F.2d 82, 85 (10th Cir. 1964).

On its face, Plaintiff's complaint does not state a claim against Hall. The fact that Hall is a claims specialist for State Farm, by itself, does not support a claim against Hall. Moreover, under Oklahoma law a claim against Hall does not exist for actions undertook as agent of State Farm. Wiley v. Safeway Stores, 400 F.Supp. 653 (N.D. Okla. 1975). On the facts stated in their Complaint, the Maners do not state a claim against Hall, nor does Oklahoma law support a claim against Hall. Therefore, Hall's motion to dismiss is granted and the Maner's Motion to Remand is denied.

IT IS SO ORDERED THIS 6th DAY OF OCTOBER, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PUBLIC SERVICE COMPANY OF OKLAHOMA,

Plaintiff,

v.

HAMON OPERATING COMPANY,

Defendant.

No. 92-C-394-B

O R D E R

The Court has for decision the motion of Public Service Company of Oklahoma ("PSO") of August 6, 1993, to have its motion for summary judgment deemed confessed (docket #141), and the motion of Hamon Operating Company ("Hamon") in response for sanctions of August 11, 1993 (docket #154). The PSO motion is now moot by reason of the Court's order of August 11, 1993, and Hamon's motion for sanctions is hereby overruled.

Further, the motion *in limine* of the Plaintiff/Counterclaim Defendant, PSO, concerning contract interpretation testimony (docket #91) is hereby overruled except in reference to those expert evidentiary matters Hamon has specifically stipulated in the case.

DATED this 6th day of October, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PUBLIC SERVICE COMPANY OF OKLAHOMA,

Plaintiff,

v.

HAMON OPERATING COMPANY,

Defendant.

No. 92-C-394-B

O R D E R

Before the court for decision are various motions for partial summary judgment pursuant to Fed.R.Civ.P. 56 of the Plaintiff, Public Service Company of Oklahoma ("PSO") (docket #112), and the Defendant, Hamon Operating Company ("Hamon") (docket #120 and #127). PSO's motion for partial summary judgment contains eight propositions or issues and Hamon's motion for partial summary judgment contains five propositions or issues of which three involve the same subject matter as that of PSO. Hamon has also filed a motion for summary judgment concerning interpretation of Paragraph 6.2 of the subject contracts (docket #51).

The Standard of Fed.R.Civ.P. 56 Motion for Summary Judgment

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Windon Third Oil & Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

> "The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. Conaway v. Smith, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980).

A recent Tenth Circuit Court of Appeals decision in Committee for the First Amendment v. Campbell, 962 F.2d 1517 (10th Cir. 1992), concerning summary judgment states:

> "Summary judgment is appropriate if 'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.' . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination. . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be 'merely colorable' or anything short of 'significantly probative.' . . .
>
> "A movant is not required to provide evidence negating an opponent's claim. . . . Rather, the burden is on the nonmovant, who 'must present affirmative evidence in order to defeat a properly supported motion for summary judgment.' . . . After the nonmovant has had a

> full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (citations omitted). *Id.* at 1521."

The Court will first discuss and decide the eight propositions or issues urged by PSO in its motion for partial summary judgment (docket #112).

1. **Lawful production** - The Court overrules PSO's contention that contract quantities regarding Hamon's take-or-pay claims herein is affected by compliance with 52 O.S. §§ 87.1, 232 or 239. The Court concludes that if Hamon establishes that it has not exceeded the "allowable" set forth in Oklahoma Corporation Commission ("OCC")-OGCR Rule 2-331(B) in determining daily volume and contract quantity, such will suffice in establishing lawful production. The Court's conclusion derives from the conduct of the parties and the historical performance of the contract and the presumptions of lawfulness to which Hamon is entitled. Violations of 52 O.S. §§ 87.1, 232 or 239, must be asserted and proved by PSO defensively. If the Court's conclusions herein regarding lawful production are thought in conflict with the Court's order in the Union Pacific case, the Court is aware of such possible interpretation.

2. **The two year contract limitation** - The PSO motion for partial summary judgment is sustained regarding gas actually delivered and disputes regarding same. The two year period runs from the date of the "statement or payment" in dispute. Concerning gas not delivered and subject to the "take-or-pay" obligation of the nine contracts where deficiency is claimed, PSO's motion for partial

summary judgment is overruled. Such two year limitation period of Section 9.1 refers to gas delivered, not gas having a "pay" obligation that was not taken and delivered.

3. **Available days** - The Court overrules PSO's motion for partial summary judgment concerning not being required to take-or-pay for gas under Contracts 02HAM004, 02HAM005, 02HAM008, 02HAM011, 02HAM012, 02HAM14, 02HAM017, and 02HAM018, that did not meet quality standards and specifications. The Court concludes fact questions exist concerning whether PSO properly notified Hamon that it was rejecting such gas as required by the Oklahoma Uniform Commercial Code ("UCC").

4. **Temporary excess gas release agreements** - The Court overrules PSO's motion for partial summary judgment because fact questions exist regarding the intent of the parties and release of the entire accounting year, or only from the date the temporary excess gas release agreement was signed mid-year.

5. **Prejudgment interest** - The Court will reserve ruling on the prejudgment interest issue until after trial on the merits. The facts may support an award of prejudgment interest. Union Pacific is distinguishable because the seller therein admittedly sent inflated billings and genuine factual questions regarding alleged fraud were present.

6. **Deliverability tests** - PSO's motion for partial summary judgment regarding deliverability tests is overruled because material fact questions remain.

7. **Hamon's Second Amended Counterclaim (pricing issue)** - Hamon's

counterclaim involves four contracts: 02HAM017, 02HAM018, 02HAM029 and 02HAM030, and the market applicable alternate price provision. The Court sustains PSO's motion for partial summary judgment wherein the uncontroverted material facts establish that PSO gave in writing a timely written notice to Hamon of an applicable alternate price and Hamon did not within ninety days notify PSO of a third party's bona fide offer of a higher price than PSO's stated applicable alternate price.

8. **Ninety day notice issue** - This issue applies to three contracts: 02HAM017, 02HAM018 and 02HAM029, and concerns Hamon's obligation to give a ninety day notice at the end of the contract accounting year as a condition of asserting take-or-pay deficiency claims against PSO. The Court overrules PSO's motion because during such time that PSO was asserting *force majeure* Hamon would be excused from giving such ninety-day deficiency notice. Hamon would not be required to perform a futile act. Unless Hamon was justifiably excused, the ninety-day notice provision is enforceable.

Hamon's consolidated motion for partial summary judgment (docket #120) in reference to the five propositions and in reference to interpretation of Paragraph 6.2 (docket #51) are discussed hereafter.

1. **The two year statute of limitations** - See the Court's ruling above in Paragraph 2 regarding PSO's partial motion for summary judgment and the two year statute of limitations.

2. **Ninety day deficiency notice under Contracts 02HAM017, 02HAM018 and 02HAM029** - See the Court's ruling concerning the same

issue in PSO's motion for partial summary judgment in paragraph 8 above.

3. PSO's use of certain internal reserve estimates to calculate contract quantity is contrary to the law. This subject is moot as PSO has elected not to pursue it.

4. PSO's interpretation application of the term "natural flow" in 52 O.S. § 29 is contrary to Oklahoma law. The Court sustains the motion for partial summary judgment of Hamon that for purposes of determining 50% of the daily "natural flow" allowable under 52 O.S. § 29, the Oklahoma Corporation Commission definition of "natural flow" of "absolute open flow" potential is applicable herein regarding Paragraph 6.1(B).

5. The determination of contract quantities is not affected by 52 O.S. §§ 87.1, 232, or 239. See the Court's ruling in regard to PSO's lawful production issue set out above in Paragraph 1.

6. **Hamon's motion for partial summary judgment on Section 6.2 of the subject contracts** - The Court overrules Hamon's motion for partial summary judgment regarding interpretation of Paragraph 6.2 in Contracts No. 02HAM004, 02HAM005, 02HAM008, 02HAM011, 02HAM012, 02HAM014, 02HAM017 and 02HAM018. The contract language of Paragraph 6.2 is clear, calling for the contract quantity to be reduced by the difference between "maximum volume" of gas and the "actual volume available for delivery" during any period or day of the accounting year. Such applies both during periods when PSO requests gas from the well, and during periods when it does not request gas from the well. Hamon's course of performance argument

does not supplant the express terms of Paragraph 6.2 of the eight contracts. 12A O.S. § 2-208(2). The parties would not have intended an interpretation of the contract that would require Hamon to exceed lawful production in carrying out its provisions.

The parties are ordered to adhere to the following schedule:

December 10, 1993	Final *in limine* Motions
December 17, 1993, 2:00 P.M.	Final Pretrial Conference
January 3, 1994	File Agreed Pretrial Order
January 10, 1994	File Requested Voir Dire, Requested Instructions and any Trial Briefs
January 18, 1994	Jury trial at 9:30 A.M.

DATED this 6th day of October, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	
vs	)	93-C-490--B
	)	
STEVEN DUDLEY,	)	
	)	
Defendant,	)	
	)	
IPM, INC. OF OKLAHOMA,	)	
	)	
Garnishee.	)	

PAYMENT AGREEMENT AND FINAL ORDER
OF GARNISHMENT

Plaintiff, the United States of America, having obtained its judgment herein, and the defendant, having consented to this Payment Agreement, hereby agree as follows:

1. Plaintiff's consent to this Payment Agreement is based upon defendant's request to continue garnishment through his employer, IPM, INC. OF OKLAHOMA ("IPM"), certain financial information which defendant has provided and the defendant's express representation to Plaintiff that he is unable to presently pay the amount of indebtedness in full and the further representation of the defendant that he waives his right to request a hearing on this garnishment and will willingly and truly honor and comply with the Payment Agreement entered herein which provides terms and conditions for the defendant's payment of the Judgment, together with costs and accrued interest, in regular monthly installment payments, as follows:

NOTE: THIS ORDER IS TO BE MAILED BY MOVANT TO ALL COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

(a) Beginning on or before the 10th day of October, 1993, and continuing each following month, garnishment installments totalling the amount of $250.00 per month shall be mailed to the U.S. Attorney's Office until the entire amount of the Judgment, together with costs and accrued post judgment interest, is paid in full.

(b) The defendant's employer, garnishee herein, shall mail each monthly installment payment to: United States Attorney's Office, Debt Collection Unit, 333 West 4th, 3460 U. S. Courthouse, Tulsa, OK 74103, and make such check payable to: **U.S. Department of Justice.**

(c) Each said payment made by defendant shall be applied in accordance with the U. S. Rule, i.e., first to the payment of costs, second to the payment of postjudgment interest (as provided by 28 U.S.C. §1961) accrued to the date of the receipt of said payment, and the balance, if any, to the principal.

(d) The defendant shall keep the United States currently informed in writing of any material change in his financial situation or ability to pay, and of any change in his employment, place of residence or telephone number. Defendant shall provide such information to the United States Attorney at the address set forth in (b) above.

(e) The defendant shall provide the United States with current, accurate evidence of his assets, income and expenditures (including, but not limited to, his Federal income tax returns) within fifteen (15) days of the date of a request for such evidence by the United States Attorney.

2. Default under the terms of this Payment Agreement will entitle the United States to execute on the judgment without notice to the defendant.

3. The defendant has the right of prepayment of this debt without penalty.

4. The parties further agree that any Order of Payment which may be entered by the Court pursuant hereto may thereafter be modified and amended upon stipulation of the parties; or, should the parties fail to agree upon the terms of a new stipulated Order of Payment, the Court may, after examination of the defendant, enter a supplemental Order of Payment.

S/ THOMAS R. BRETT
United States District Judge

APPROVED AS TO FORM:

STEPHEN C. LEWIS
United States Attorney

KATHLEEN BLISS ADAMS, OBA # 13625
Assistant U. S. Attorney
Attorney for Plaintiff

STEVEN DUDLEY, Debtor

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. THE UNKNOWN HEIRS, EXECUTORS, ADMINISTRATORS, DEVISEES, TRUSTEES, SUCCESSORS AND ASSIGNS OF LARRY M. GLIDEWELL a/k/a LARRY MACK GLIDEWELL, Deceased; TAMMY GLIDEWELL a/k/a TAMMY J. GLIDEWELL a/k/a TAMMY J. PUTNAM; CARL GLIDEWELL a/k/a CARL M. GLIDEWELL a/k/a CARL MACK GLIDEWELL, individually, and as Administrator of the Estate of Larry M. Glidewell a/k/a Larry Mack Glidewell, Deceased; COUNTY TREASURER, Ottawa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Ottawa County, Oklahoma; JOSHUA GLIDEWELL; BETTY L. GLIDEWELL; STEVE GLIDEWELL; TERRI KESLER; SHERRI MERRIWEATHER; STATE OF OKLAHOMA ex rel. OKLAHOMA TAX COMMISSION, Defendants.	CIVIL ACTION NO. 91-C-312-C

F I L E D

OCT 7 - 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 6 day of Oct, 1993. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney; the Defendant, Terri Kesler, appears through her attorney, Mary L. Blume; the Defendants, County Treasurer, Ottawa County, Oklahoma, and Board of County Commissioners, Ottawa County, Oklahoma, appear not, having previously disclaimed any right, title or interest in the subject property; the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, appears not, having

previously filed its Disclaimer; and the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Larry M. Glidewell a/k/a Larry Mack Glidewell, Deceased; Tammy Glidewell a/k/a Tammy J. Glidewell a/k/a Tammy J. Putnam; Carl Glidewell a/k/a Carl M. Glidewell a/k/a Carl Mack Glidewell, individually, and as Administrator of the Estate of Larry M. Glidewell a/k/a Larry Mack Glidewell, Deceased; Joshua Glidewell; Sherri Merriweather; Betty L. Glidewell; and Steve Glidewell, appear not, but make default.

The Court, being fully advised and having examined the court file, finds that the Defendant, **Tammy Glidewell a/k/a Tammy J. Glidewell a/k/a Tammy J. Putnam**, acknowledged receipt of Summons and Complaint on May 16, 1991; that Defendant, **Carl M. Glidewell a/k/a Carl Glidewell a/k/a Carl Mack Glidewell, individually, and as Administrator of the Estate of Larry M. Glidewell a/k/a Larry Mack Glidewell, Deceased**, acknowledged receipt of Summons and Complaint on May 13, 1991; that Defendant, **Joshua Glidewell**, acknowledged receipt of Summons and Amended Complaint on September 12, 1991 through his guardian ad litem, Tammy Glidewell a/k/a Tammy J. Glidewell a/k/a Tammy J. Putnam; that Defendant, **Sherri Merriweather**, acknowledged receipt of Summons and Second Amended Complaint on June 12, 1992; that Defendant, **Terri Kesler**, was served with Summons and Second Amended Complaint on August 6, 1992; that Defendant, **Betty L. Glidewell**, acknowledged receipt of Summons and Second Amended Complaint on July 22, 1992 and was served with Summons and Second Amended Complaint on August 4, 1992; that Defendant, **Steve**

Glidewell, acknowledged receipt of Summons and Second Amended Complaint on July 3, 1992; and that the Defendant, **State of Oklahoma ex rel. Oklahoma Tax Commission**, acknowledged receipt of Summons and Third Amended Complaint on May 27, 1993.

The Court further finds that the Defendants, **The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Larry M. Glidewell a/k/a Larry Mack Glidewell, Deceased**, were served by publishing notice of this action in the Miami News-Record, a newspaper of general circulation in Ottawa County, Oklahoma, once a week for six (6) consecutive weeks beginning June 28, 1993, and continuing through August 3, 1993, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Larry M. Glidewell a/k/a Larry Mack Glidewell, Deceased, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Larry M. Glidewell

a/k/a Larry Mack Glidewell, Deceased. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Farmers Home Administration, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, County Treasurer, Ottawa County, Oklahoma, and Board of County Commissioners, Ottawa County, Oklahoma, filed their Answer on May 15, 1991, disclaiming any right, title or interest in the subject property; that the Defendant, Terri Kesler, filed her Answer on August 21, 1992; that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, filed its Answer, Counterclaim and Cross-Claim on June 21, 1993 and filed its Withdrawal of Answer, Counterclaim and Cross-Claim and Issuance of Disclaimer on August 31, 1993; and that Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Larry M. Glidewell a/k/a Larry Mack Glidewell, Deceased; Tammy

Glidewell a/k/a Tammy J. Glidewell a/k/a Tammy J. Putnam; Carl Glidewell a/k/a Carl M. Glidewell a/k/a Carl Mack Glidewell, individually, and as Administrator of the Estate of Larry M. Glidewell a/k/a Larry Mack Glidewell, Deceased; Joshua Glidewell; Sherri Merriweather; Betty L. Glidewell; and Steve Glidewell, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon certain promissory notes and for foreclosure of mortgages securing said promissory notes upon the following described real property located in Ottawa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> South Half (S½) of the Northeast Quarter (NE¼), and South Half (S½) of Northwest Quarter (NW¼), and Northeast Quarter (NE¼) of Southeast Quarter (SE¼), of Section Twenty-one (21), Township Twenty-nine (29) North, Range Twenty-four (24) East of the Indian Meridian, Ottawa County, Oklahoma.

The Court further finds that this is a suit brought for the further purpose of judicially determining the death of Larry M. Glidewell a/k/a Larry Mack Glidewell and of judicially determining the heirs of Larry M. Glidewell a/k/a Larry Mack Glidewell.

The Court further finds that Larry M. Glidewell a/k/a Larry Mack Glidewell, now deceased, (hereinafter referred to by ther of these names) became the record owner of the real property involved in this action by virtue of a General Warranty Deed Dated April 18, 1979 from M. Eva Lee, which was filed in the

records of the County Clerk of Ottawa County, Oklahoma, on July 11, 1979, in Book 391, Page 100.

The Court further finds that Larry Mack Glidewell died on May 27, 1989, while seized and possessed of the real property being foreclosed. A Certificate of Death was issued by the Oklahoma State Department of Health certifying Larry Mack Glidewell's death and was attached as Exhibit "A" to Plaintiff's Third Amended Complaint.

The Court further finds that Larry M. Glidewell, Carl M. Glidewell and Tammy J. Glidewell executed and delivered to the United States of America, acting through the Farmers Home Administration, the following Promissory Notes and Reamortization and/or Deferral Agreements:

Debtor	Document	Date
L. Glidewell	Promissory Note	12-04-79
L. Glidewell	Reamortization	12-18-84
L. Glidewell	Reamortization	12-09-86
L. Glidewell	Promissory Note	06-11-80
L. Glidewell	Reamortization	12-18-84
L. Glidewell	Reamortization	12-09-86
L. Glidewell	Promissory Note	05-26-78
L. Glidewell C. Glidewell	Promissory Note	12-05-78
L. Glidewell C. Glidewell	Promissory Note	05-28-80
L. Glidewell	Promissory Note	12-18-84
L. Glidewell	Promissory Note	12-09-86
L. Glidewell	Promissory Note	05-21-81

Debtor	Document	Date
T. Glidewell		
L. Glidewell	Promissory Note	12-18-84
L. Glidewell	Promissory Note	12-09-86
L. Glidewell T. Glidewell	Promissory Note	05-21-81
L. Glidewell	Promissory Note	12-18-84
L. Glidewell	Promissory Note	12-09-86
L. Glidewell T. Glidewell	Promissory Note	05-21-81
L. Glidewell	Promissory Note	12-18-84
L. Glidewell	Promissory Note	12-09-86

The Court further finds that as security for the payment of the above-described notes and agreements, Larry M. Glidewell and Tammy J. Glidewell executed and delivered to the United States of America, acting through the Farmers Home Administration, the following real estate mortgages covering the above-described property, situated in the State of Oklahoma, Ottawa County:

Debtors	Document	Date	Recorded	Book	Page	County
L. Glidewell	Mortgage	12-04-79	12-04-79	395	337	Ottawa
L. Glidewell	Mortgage	06-11-80	06-11-80	399	388	Ottawa
L. Glidewell	Mortgage	05-21-81	05-21-81	407	345	Ottawa
T. Glidewell			06-01-81	407	607	Ottawa

The Court further finds that, as collateral security for the payment of the above-described notes, Larry M. Glidewell and Tammy J. Glidewell executed and delivered to the United States of America, acting through the Farmers Home Administration, the

following financing statements and security agreements thereby creating in favor of Farmers Home Administration a security interest in certain crops, livestock, farm equipment and the above-described real property described therein:

Debtor	Document	Date	Filed	File#	County
L. Glidewell	Fin. Stmt.	12-06-78	12-06-78	367279	Oklahoma
L. Glidewell T. Glidewell	Cont. Stmt.	08-01-83	08-01-83	68079	Oklahoma
L. Glidewell T. Glidewell	Cont. Stmt.	07-15-88	07-15-88	41085	Oklahoma
L. Glidewell T. Glidewell	Fin. Stmt.	05-22-81	05-22-81	1178	Ottawa
L. Glidewell T. Glidewell	Cont. Stmt.	05-20-86	05-20-86	0759	Ottawa
L. Glidewell	Fin. Stmt.	12-05-78	12-05-78	10046	Ottawa
L. Glidewell T. Glidewell	Cont. Stmt.	08-01-83	08-01-83	2143	Ottawa
L. Glidewell T. Glidewell	Cont. Stmt.	07-12-88	07-12-88	0834	Ottawa
L. Glidewell	Sec. Agree.	06-28-79			
L. Glidewell	Sec. Agree.	06-11-80			
L. Glidewell	Sec. Agree.	08-04-80			
L. Glidewell T. Glidewell	Sec. Agree.	05-22-81			
L. Glidewell T. Glidewell	Sec. Agree.	06-15-81			
L. Glidewell	Sec. Agree.	07-27-83			
. Glidewell	Sec. Agree.	11-29-84			
. Glidewell	Sec. Agree.	12-23-85			
L. Glidewell	Sec. Agree.	12-03-86			
L. Glidewell	Sec. Agree.	12-09-87			
L. Glidewell	Fin. Stmt.	12-09-88	12-09-88	886539	Ottawa

The Court further finds that all remaining chattels in this foreclosure action were liquidated and moneys properly applied to the account.

The Court further finds that Larry M. Glidewell a/k/a Larry Mack Glidewell, now deceased, Tammy Glidewell a/k/a Tammy J. Glidewell a/k/a Tammy J. Putnam, and Carl Glidewell a/k/a Carl M. Glidewell a/k/a Carl Mack Glidewell, individually, and as Administrator of the Estate of Larry M. Glidewell a/k/a Larry Mack Glidewell, Deceased, made default under the terms of the aforesaid promissory notes, mortgages, financing statements and security agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, **Carl Glidewell a/k/a Carl M. Glidewell a/k/a Carl Mack Glidewell, as Administrator of the Estate of Larry M. Glidewell a/k/a Larry Mack Glidewell**, is indebted to the Plaintiff in the principal amount of $231,631.75, plus accrued interest in the amount of $31,942.24 as of July 9, 1990, plus interest accruing thereafter at the rate of $24.7313 per day until judgment, plus interest thereafter at the legal rate until fully paid; the Defendant, **Tammy Glidewell a/k/a Tammy J. Glidewell a/k/a Tammy J. Putnam**, is indebted to the Plaintiff in the principal amount of $21,756.12, plus interest in the amount of $7,304.88 as of July 9, 1990, plus interest at the rate of 13.9024 per day until judgment, plus interest thereafter at the legal rate until fully paid; and the Defendant, **Carl Glidewell a/k/a Carl M. Glidewell a/k/a Carl Mack Glidewell, individually**, is indebted to the Plaintiff in the principal

amount of $28,502.97, plus accrued interest in the amount of $3,954.64 as of July 9, 1990 plus interest accruing at a rate of 2.8788 per day until judgment and at the legal judgment rate thereafter until paid, and the costs of this action in the amount of $553.80 ($57.40 fees for service of Summons and Complaint, $486.40 publication fees, $10.00 fee for recording Notice of Lis Pendens).

The Court further finds that the Plaintiff is entitled to a judicial determination of death of Larry M. Glidewell a/k/a Larry Mack Glidewell and to a judicial determination of the heirs of Larry M. Glidewell a/k/a Larry Mack Glidewell.

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Ottawa County, Oklahoma, claim no right, title or interest in the subject real property.

The Court further finds that the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Larry M. Glidewell a/k/a Larry Mack Glidewell, Deceased; Tammy Glidewell a/k/a Tammy J. Glidewell a/k/a Tammy J. Putnam; Carl Glidewell a/k/a Carl M. Glidewell a/k/a Carl Mack Glidewell, individually, and as Administrator of the Estate of Larry M. Glidewell a/k/a Larry Mack Glidewell, Deceased; Joshua Glidewell; Sherri Merriweather; Betty L. Glidewell; and Steve Glidewell, are in default and have no right, title or interest in the subject property of this action.

The Court further finds that the Defendant, Terri Kesler, may or may not have some right, title or interest to the

property which is the subject matter of this action by virtue of being an heir to Larry M. Glidewell a/k/a Larry Mack Glidewell, Deceased. Said claim is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, disclaims any right, title or interest in the subject property of this action.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the death of Larry Mack Glidewell be and the same hereby is judicially determined to have occurred on May 27, 1989 in the City of Bernice, Delaware County, Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the only known heirs of Larry M. Glidewell a/k/a Larry Mack Glidewell, Deceased, are Carl M. Glidewell a/k/a Carl Glidewell a/k/a Carl Mack Glidewell, Joshua Glidewell, Sherri Merriweather, Terri Kesler, Betty L. Glidewell, and Steve Glidewell, and that despite the exercise of due diligence by Plaintiff and its counsel, no other known heirs of Larry M. Glidewell a/k/a Larry Mack Glidewell, Deceased, have been discovered and it is hereby judicially determined that Carl M. Glidewell a/k/a Carl Glidewell a/k/a Carl Mack Glidewell, Joshua Glidewell, Sherri Merriweather, Terri Kesler, Betty L. Glidewell, and Steve Glidewell are the only known heirs of Larry M. Glidewell a/k/a Larry Mack Glidewell, Deceased, and that Larry M. Glidewell a/k/a Larry Mack Glidewell, Deceased, has no other known heirs, executors, administrators, devisees, trustees, successors and assigns; and

the Court approves the Certificate of Publication and Mailing filed on August 31, 1993 regarding said heirs.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendant, **Carl Glidewell a/k/a Carl M. Glidewell a/k/a Carl Mack Glidewell, as Administrator of the Estate of Larry M. Glidewell a/k/a Larry Mack Glidewell**, in the principal amount of $231,631.75, plus accrued interest in the amount of $31,942.24 as of July 9, 1990, plus interest accruing thereafter at the rate of $24.7313 per day until judgment, plus interest thereafter at the current legal rate of 3.21 percent per annum until paid, plus the costs of this action in the amount of $315.35 ($57.40 fees for service of Summons and Complaint, $247.95 publication fees, $10.00 fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendant, **Tammy Glidewell a/k/a Tammy J. Glidewell a/k/a Tammy J. Putnam**, in the amount of $21,756.12 principal, plus interest in the amount of $7,304.88 as of July 9, 1990, plus interest at the rate of 13.9024 per day until judgment, plus interest thereafter at the current legal rate of 3.21 percent per annum until paid.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendant, **Carl M. Glidewell a/k/a Carl Glidewell a/k/a Carl Mack Glidewell,**

individually, in the amount of $28,502.97 principal, plus accrued interest in the amount of $3,954.64 as of July 9, 1990 plus interest accruing at a rate of 2.8788 per day until judgment, plus interest thereafter at the current legal rate of 3.21 percent per annum until paid.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **Terri Kesler**, have and recover her pro rata interest in any surplusage from the sale by virtue of being an heir to Larry M. Glidewell a/k/a Larry Mack Glidewell, Deceased.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Larry M. Glidewell a/k/a Larry Mack Glidewell, Deceased; Tammy Glidewell a/k/a Tammy J. Glidewell a/k/a Tammy J. Putnam; Carl Glidewell a/k/a Carl M. Glidewell a/k/a Carl Mack Glidewell, individually, and as Administrator of the Estate of Larry M. Glidewell a/k/a Larry Mack Glidewell, Deceased; Joshua Glidewell; Sherri Merriweather; Betty L. Glidewell; Steve Glidewell; County Treasurer and Board of County Commissioners, Ottawa County, Oklahoma;** and **State of Oklahoma ex rel. Oklahoma Tax Commission**, have no right, title, or interest in the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, Carl Glidewell a/k/a Carl M. lidewell a/k/a Carl Mack Glidewell, as Administrator of the Estate of Larry M. Glidewell a/k/a Larry Mack Glidewell, Tammy Glidewell a/k/a Tammy J. Glidewell a/k/a Tammy J. Putnam, and Carl Glidewell a/k/a Carl M. Glidewell a/k/a Carl Mack Glidewell,

individually, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell, according to Plaintiff's election with or without appraisement, the property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment to the Defendant, Terri Kesler, according to her pro rata interest in any surplusage from the sale.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject property or any part thereof.

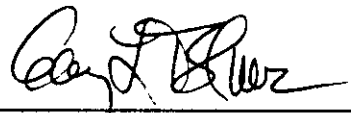
(Signed) H. Dale Cook

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

PHIL PINNELL, OBA #7169
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



GARY L. BLUME
2300 East University Boulevard
Tuscaloosa, Alabama 35404
(205) 556-6712
Attorney for Defendant, Terri Kesler

Judgment of Foreclosure
Civil Action No. 91-C-312-C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FEDERAL DEPOSIT INSURANCE CORPORATION,

Plaintiff,

v.

DWIGHT W. MAULDING,

Defendant.

Case No. C-92-C-902-C

DISMISSAL WITH PREJUDICE

The Plaintiff, Federal Deposit Insurance Corporation, does hereby dismiss with prejudice the above entitled action in its entirety.

FEDERAL DEPOSIT INSURANCE CORPORATION

By: _____
Bank Liquidation Specialist
As Attorney-In-Fact, acting under and pursuant to the terms of that certain Power of Attorney, the promulgation of which was published December 8, 1992, in the Federal Register, Vol. 57, No. 236, at Page 58020, in accordance with Title 16 Oklahoma Statutes 1991, Section 20.

ACKNOWLEDGMENT

STATE OF OKLAHOMA)
) ss:
COUNTY OF OKLAHOMA)

Before me, the undersigned, a Notary Public, in and for said County and State on this 6th day of October, 1993, personally appeared John Fisher, to me known to be the identical person who subscribed the name of the maker thereof to the foregoing instrument as its Bank Liquidation Specialist as Attorney-In-Fact for the Federal Deposit Insurance Corporation, and acknowledged to me that he executed the same as his free and voluntary act and deed and as the free and voluntary act and deed of such corporation, for the uses and purposes therein set forth.

Susie Rankin
Notary Public

My Commission expires:
June 8, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

OLEITA BOWLING, an individual, and B. D. BOWLING, her husband,	)	
Plaintiffs,	)	
vs.	)	No. 93-C-215-B
MAVERICK RESTAURANT CORPORATION (an Arkansas Corporation) d/b/a GRANDY'S OF BROKEN ARROW,	)	
Defendant.	)	

STIPULATION OF DISMISSAL

COME NOW the Plaintiffs, Oleita Bowling and B. D. Bowling, and the Defendant, Maverick Restaurant Corporation d/b/a Grandy's of Broken Arrow, by and through their respective attorneys, and in accordance with Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedures, hereby stipulate to the dismissal with prejudice of all claims and causes of action involved herein with prejudice for the reason that all matters, causes of action and issues in the case have been settled, compromised and released herein, including post and pre-judgment interest.

DANIEL S. SULLIVAN
Attorney for Plaintiff

STEPHEN C. WILKERSON
Attorney for Defendant

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILLIAM E. TACKETT, JR. and SHARON KAY TACKETT, husband and wife, Plaintiffs, vs. (1) UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT; (2) PRESTIGIOUS PROPERTY, INC., an Oklahoma corporation, and, (3) COMMERCIAL BANK AND TRUST COMPANY OF TULSA, Defendants.	CASE NO. 93-C-805-B

NOTICE OF DISMISSAL
WITHOUT PREJUDICE BY PLAINTIFF

TO: (1) **U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**; (2) **PRESTIGIOUS PROPERTY, INC.**, an Oklahoma corporation; and, (3) **COMMERCIAL BANK AND TRUST COMPANY OF TULSA**, defendants.

Notice is hereby given that **WILLIAM M. TACKETT, JR. and SHARON KAY TACKETT**, husband and wife, the above-named plaintiffs, hereby dismiss the above-entitled action without prejudice, pursuant to Rule 41(a)(1)(i) of the Federal Rules of Civil Procedure, and hereby files this notice of dismissal with the Clerk of the Court before service by defendant of either an answer or a motion for summary judgment.

Dated October 8, 1993.

THORNTON and THORNTON,
a Professional Corporation
525 South Main, Suite 660
Tulsa, Oklahoma 74103
Telephone: (918) 587-2544
Fax No.: (918) 582-0551

By: David M. Thornton
David M. (Mike) Thornton, Jr.
OBA No. 9000

ATTORNEYS FOR PLAINTIFFS,
WILLIAM M. TACKETT, JR. and
SHARON KAY TACKETT,
husband and wife

CERTIFICATE OF MAILING

I, David M. (Mike) Thornton, Jr., hereby do certify that on this 8 day of Oct, 1993, a true and correct copy of the foregoing Notice of Dismissal Without Prejudice by Plaintiff was mailed by depositing same in the United States Mail with proper postage thereon, fully prepaid, to the following:

Stephen C. Lewis
United States Attorney
c/o Phil Pinnell
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103

David M. Thornton
David M. (Mike) Thornton, Jr.

TACKETT.GEN\025

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:
VIRGIL EDWARD BULLOCK,

Debtor,

SCOTT P. KIRTLEY,
Successor Trustee,

Plaintiff,

vs.

DR. LYNDALL M. BULLOCK, et al.,

Defendants.

Bankruptcy Case 81-00162-W
(Chapter 7)

Adversary #90-0222-W

Dist. Ct. #91-C-187-E
(Consolidated with
Dist. Ct. #91-C-121-E)

JUDGMENT

This cause came on for jury trial on the 19th, 20th and 21st days of July, 1993, at which time the Plaintiff, Scott P. Kirtley, Successor Trustee, appeared in person and by his attorney, Steven R. Hickman, and the Defendants (except Lee Dwayne Bullock who is in default) appeared by Velta Linebarger in person and their attorney, David H. Sanders. The parties put on their evidence and rested. Each of the parties moved the Court for a directed verdict in their favor and against the opposing party. The Court took these motions under advisement. The parties stipulated that the only disputed fact question before the Court, all other questions being questions of law for the Court, was whether the transfer of money made by the debtor, Virgil Edward Bullock, on February 7, 1980, was or was not made with the intent to hinder, delay or defraud creditors, and that is the only issue to be submitted to the jury.

After hearing the argument of counsel and the instructions of the Court, the jury did return its verdict in open court that the transfer was not made with the intent to hinder, delay or defraud creditors, which verdict has been received and filed.

The Court holds as a matter of law that Plaintiff's Motion for a Directed Verdict should be denied. The Court further holds as a matter of law that the Defendants' Motion for a Directed Verdict under Oklahoma law, Ziska v. Ziska, 95 P.2d 254 (Okl. 1908) and Eskridge v. Nalls, et al., 64 O.B.J. 1576 (Okl. CCA-May 22, 1993), should be sustained in that until an alleged creditor obtains a judgment against an alleged debtor, said creditor cannot prosecute a creditor's bill to set aside conveyances by an alleged debtor and, therefore, judgment should be entered in favor of Defendants and against the Plaintiff.

The Court further holds as a matter of law that Defendants' Motion for a Directed Verdict under 12 O.S. §105 (repealed by the laws of 1986) has been rendered moot by the jury's verdict and, likewise, Defendants' Motion for a Directed Verdict under 24 O.S. §104 (repealed by the laws of 1986) has been rendered moot by the jury's verdict.

NOW, THEREFORE, BE IT ORDERED, ADJUDGED AND DECREED by the Court that judgment is entered in favor of the Defendants, Dr. Lyndall M. Bullock, Harold C. Bullock, Lee Dwayne Bullock and Velta Linebarger, and against the Plaintiff, Scott P. Kirtley, Successor Trustee, on all of the claims of the Plaintiff against the said Defendants, to which order and rulings of the Court, the

Plaintiff excepts and such exceptions were allowed, noted and saved.

For all of which let execution issue.

Dated this 7th day of ~~September~~ Oct., 1993.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROBERT HICKS,

Plaintiff,

v.

LANTZ MCCLAIN, DISTRICT ATTORNEY FOR DISTRICT NO. 24, CREEK AND OKFUSKEE COUNTIES, OKLAHOMA, and BOARD OF COUNTY COMMISSIONERS OF CREEK COUNTY, OKLAHOMA,

Defendants.

No. 93-C-836-B

NOTICE OF
PLAINTIFF'S DISMISSAL

Plaintiff in the above-captioned cause, Robert Hicks, by and through his attorney Laura Emily Frossard, hereby dismisses the action against all defendants pursuant to Fed. R. Civ. P. 41(a).

Respectfully submitted,

Laura Emily Frossard

Laura Emily Frossard
1154 East 61st Street
Tulsa, Oklahoma 74136
(918) 749-5531

CERTIFICATE OF MAILING

I hereby certify that on this 6 day of Oct., 1993, a true and correct copy of the foregoing pleading was mailed, postage prepaid, to:

Lantz McClain
District Attorney
P.O. Box 1006
Sapulpa, Oklahoma 74067

Laura Emily Frossard

Laura Emily Frossard

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

REGINALD HORNER,

Plaintiff,

vs.

HOWARD & WIDDOWS, P.C., et al.,

Defendants.

No. 93-C-809-E

O R D E R

The Court has for consideration the unopposed Report and Recommendation of the Magistrate that the above-styled case be dismissed pursuant to 28 U..C. §1915(d). The Court has reviewed the record in light of the applicable law and finds the Report and Recommendation should be affirmed.

ORDERED this 7th day of October, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

4

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

INTERNATIONAL CHEMICAL COMPANY, an Oklahoma corporation,	)	
Plaintiff,	)	
vs.	)	No. 92-C-1012-B
MARK SETH, an individual,	)	
Defendant.	)	

J U D G M E N T

In accord with the Order filed this date sustaining the Plaintiff's Motion for Summary Judgment, the Court hereby enters judgment in favor of the Plaintiff, International Chemical Company, and against the Defendant, Mark Seth, for the amount of $251,675.00. Costs and attorney fees are assessed against Defendant, if timely applied for pursuant to Local Rule 6.

DATED this 6th day of October, 1993.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

30

ENTERED ON DOCKET

DATE 10-7-93

IN THE UNITED STATES DISTRICT COURT FOR

THE NORTHERN DISTRICT OF OKLAHOMA

ALTA LORENE BECKER,
Plaintiff,

VS.

THE MAY DEPARTMENT STORES COMPANY and FOLEY'S, a Division of The May Department Stores Company,
Defendants.

NO. 92-C-1080-B

FILED

OCT 6 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER OF DISMISSAL

This matter comes on for hearing on the Joint Stipulation of the Plaintiff, Alta Lorene Becker, and Defendants, The May Department Stores Company and Foley's, a Division of The May Department Stores Company, for a dismissal with prejudice of the above captioned cause against The May Department Stores Company and Foley's, a Division of The May Department Stores Company. The Court, being fully advised, having reviewed the Stipulation, finds that the parties herein have entered into a compromise settlement covering all claims involved in this action, which this Court hereby approves, and that the above entitled cause should be dismissed with prejudice to the filing of a future action as to The May Department Stores Company and Foley's, a Division of The May Department Stores Company, pursuant to said Stipulation.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the above entitled cause be and is hereby dismissed with prejudice to the filing

of a future action against The May Department Stores Company and Foley's, a Division of The May Department Stores Company, the parties to bear their own respective costs.

Dated this 6th day of ~~September~~ October, 1993.

S/ THOMAS R. BRETT

JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

LAWRENCE ROBERSON, Attorney for Plaintiff

RHODES, HIERONYMUS, JONES, TUCKER and GABLE

BY

WILLIAM D. PERRINE
15 W. 6th Street, Suite 2800
Tulsa, OK 74119-5430
(918) 582-1173
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PRINCE ROGERS,

Plaintiff,

vs.

NORMA BULLOCK, et al.,

Defendants.

No. 92-C-756-E

ORDER

The above captioned case is dismissed for failure to pay a filing fee. See Local Rule 6.

SO ORDERED THIS 4th day of October, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

4

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ATLANTIC RICHFIELD COMPANY,

Plaintiff,

vs.

AMERICAN AIRLINES, INC., et al.,

Defendants.

Case No. 89-C-868-B
89-C-869-B
89-C-859-B

J U D G M E N T

In accord with the Order filed this date sustaining the Defendant's Motion for Summary Judgment, the Court hereby enters judgment in favor of the Defendant, Tulsa Screw Product Company, and against the Plaintiff, Atlantic Richfield Company. Plaintiff shall take nothing of its claim. Costs are assessed against the Plaintiff, if timely applied for under Local Rule 6, and each party is to pay its respective attorney's fees.

Dated, this 1st day of October, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ATLANTIC RICHFIELD COMPANY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 89-C-868-B
	)	89-C-869-B
AMERICAN AIRLINES, INC., et al.,	)	89-C-859-B
	)	
Defendants.	)	

J U D G M E N T

In accord with the Order filed this date sustaining the Defendant's Motion for Summary Judgment, the Court hereby enters judgment in favor of the Defendant, Cintas Corporation, and against the Plaintiff, Atlantic Richfield Company. Plaintiff shall take nothing of its claim. Costs are assessed against the Plaintiff, if timely applied for under Local Rule 6, and each party is to pay its respective attorney's fees.

Dated, this 1st day of October, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ATLANTIC RICHFIELD COMPANY, Plaintiff,	)	
vs.	)	Case No. 89-C-868-B
	)	89-C-869-B
AMERICAN AIRLINES, INC., et al.,	)	89-C-859-B
Defendants.	)	

J U D G M E N T

In accord with the Order filed this date sustaining the Defendant's Motion for Summary Judgment, the Court hereby enters judgment in favor of the Defendant, Miller Truck Lines, Inc., and against the Plaintiff, Atlantic Richfield Company. Plaintiff shall take nothing of its claim. Costs are assessed against the Plaintiff, if timely applied for under Local Rule 6, and each party is to pay its respective attorney's fees.

Dated, this 1st day of October, 1993.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

ATLANTIC RICHFIELD COMPANY,	Consolidated Case Nos.
Plaintiff,	89-C-868-B 89-C-869-B
v.	90-C-859-B
AMERICAN AIRLINES, INC., ET AL.	
Defendants.	

ORDER FOR DISMISSAL WITHOUT PREJUDICE

Now on this 30th day of September, 1993, upon presentation of the Stipulation for Dismissal Without Prejudice executed by Plaintiff Atlantic Richfield Company and Defendant Jess Vanhooser, the Court finds and adjudges that all claims of Atlantic Richfield Company set forth herein against Jess Vanhooser should be and are hereby dismissed without prejudice to any future action upon such claims and that each of these parties shall bear and be responsible for its own costs and expenses incurred herein.

S/ THOMAS R. BRETT

Judge

Approved as to form and content:

Gary A. Eaton, Attorney for
Atlantic Richfield Company

Jess Vanhooser

AXA93C95.SEL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ATLANTIC RICHFIELD COMPANY,

Plaintiff,

vs.

AMERICAN AIRLINES, INC., et al.,

Defendants.

Case No. 89-C-868-B
89-C-869-B
89-C-859-B

J U D G M E N T

In accord with the Order filed this date sustaining the Plaintiff's Motion for Summary Judgment, the Court hereby enters judgment in favor of the Plaintiff, Atlantic Richfield Company, and against Defendants, Vacuum & Pressure Tank Truck Service and Glenn Wynn as set forth herein.

Defendants Vacuum & Pressure Tank Truck Service and Glenn Wynn are jointly and severally liable for the necessary response costs incurred by ARCO regarding the Glenn Wynn portion of the Sand Springs Petrochemical Complex which are consistent with the National Contingency Plan, less any portion of such costs attributed to ARCO at the trial of this matter.

Defendants Vacuum & Pressure Tank Truck Service and Glenn Wynn are jointly and severally liable for the necessary response costs which ARCO incurs in the future regarding the Glenn Wynn portion of the Sand Springs Petrochemical Complex which are consistent with the National Contingency Plan, less any portion of such costs attributed to ARCO. This declaratory judgment shall be binding in

any subsequent action or actions to recover future response costs or damages. 42 U.S.C. §9613(g)(2).

Defendants Vacuum & Pressure Tank Truck Service and Glenn Wynn are severally liable to ARCO by way of contribution for a portion of the costs which ARCO has paid the United States in connection with the Glenn Wynn portion of the Sand Springs Petrochemical Complex.

Defendants Vacuum & Pressure Tank Truck Service and Glenn Wynn are severally liable to ARCO by way of contribution for a portion of the costs ARCO may in the future pay to the United States or any other party for actions pertaining to the Glenn Wynn portion of the Sand Springs Petrochemical Complex.

DATED this 15th day of October, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ATLANTIC RICHFIELD COMPANY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 89-C-868-B
	)	89-C-869-B
AMERICAN AIRLINES, INC., et al.,	)	89-C-859-B
	)	
Defendants.	)	

J U D G M E N T

In accord with the Order filed this date sustaining the Plaintiff's Motion for Summary Judgment, the Court hereby enters judgment in favor of the Plaintiff, Atlantic Richfield Company, and against the following Defendants:

1. Baker-Hughes Incorporated;
2. Borg-Warner Corporation;
3. Burgess-Norton Mfg. Co.;
4. Chief Supply Corporation (sued as Chief Chemical Supply and Chief Chemical & Supply, Inc.;
5. Crane Carrier Corp.;
6. Dover Corporation;
7. Groendyke Transport, Inc.;
8. Jerry Inman Trucking, Inc.;
9. Kansas Industrial Environmental Services, Inc.;
10. McDonnell Douglas Corporation;
11. MK&O Coach Lines;
12. Paccar, Inc.;

13. Ramsey Winch Company;

14. Ryder Truck Rental, Inc.;

15. The Uniroyal Goodrich Tire Company;

16. Webco Industries, Inc.;

17. Whirlpool Corporation.

Judgment is entered against the aforementioned Defendants as follows:

The aforementioned Defendants are jointly and severally liable for the necessary response costs incurred by ARCO regarding the Glenn Wynn portion of the Sand Springs Petrochemical Complex which are consistent with the National Contingency Plan, less any portion of such costs attributed to ARCO at the trial of this matter.

The aforementioned Defendants are jointly and severally liable for the necessary response costs which ARCO incurs in the future regarding the Glenn Wynn portion of the Sand Springs Petrochemical Complex which are consistent with the National Contingency Plan, less any portion of such costs attributed to ARCO. This declaratory judgment shall be binding in any subsequent action or actions to recover future response costs or damages.

The aforementioned Defendants are severally liable to ARCO by way of contribution for a portion of the costs which ARCO has paid the United States in connection with the Glenn Wynn portion of the Sand Springs Petrochemical Complex.

The aforementioned Defendants are severally liable to ARCO by way of contribution for a portion of the costs ARCO may in the future pay to the United States or any other party for actions pertaining to the Glenn Wynn portion of the Sand Springs

Petrochemical Complex.

DATED this 1st day of October, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THE O'BANNON BANKING COMPANY,

Plaintiff,

v.

ZINKLAHOMA, INC., formerly JOHN ZINK COMPANY, and THE FIRST NATIONAL BANK IN DOLTON,

Defendants,

v.

RMP CONSULTING GROUP, INC.,

Third-Party Defendant and Third-Party Plaintiff,

v.

RMP SERVICE GROUP, INC., and KOCH ENGINEERING COMPANY, INC.,

Third-Party Defendants.

Case No. 90-C-987-E

AMENDED JUDGMENT

This action came on for trial before the Court, and a jury duly empaneled and sworn, on May 26, 27, 28, June 1 and 2, 1993, the Honorable James O. Ellison presiding. The issues have been duly tried and submitted to the jury for deliberations. The jury returned a verdict in favor of The O'Bannon Banking company on its claim under its lease and against Zinklahoma and/or Koch Engineering Company, Inc. with the issue of the assumption of the lease obligations by Koch Engineering being reserved as a matter of law for this Court to decide. Subsequent thereto, this Court

considered numerous briefs submitted by the parties on certain issues and entered its ruling concerning such issues on August 17, 1993.

IT IS ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered in favor of The O'Bannon Banking Company and against Koch Engineering Company, Inc. and Zinklahoma, Inc. in the principal amount of $486,450.00, with pre-judgment interest thereon at the rate of Chase Manhattan prime plus 9% (19% per annum) in the amount of $260,310.16 through August 30, 1993, for a total amount of $746,760.16. The judgment shall bear interest at the rate of Chase Manhattan prime plus 9% (19% per annum). The issue of costs and attorney fees, including whether such fees are to be awarded in accordance with the contractual provision of one-third the amount of judgment, is reserved for future determination by the court.

ORDERED this 1st day of ~~September~~ Oct., 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

F:\SDC\PLDS\ZINKJDG

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ATLANTIC RICHFIELD COMPANY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 89-C-868-B
	)	89-C-869-B
AMERICAN AIRLINES, INC., et al.,	)	89-C-859-B
	)	
Defendants.	)	

O R D E R

Now before the Court are various procedural and substantive motions listed in the parties Amended Joint List of Motions Pending (Docket #1054). The Court will address these motions in the order they were filed.[1] The procedural and factual background of this case has been thoroughly detailed in the parties pleadings and the Court's August 3, 1993, Findings of Fact and Conclusions of Law and therefore, such introduction need not be repeated here.

Tulsa Screw Product Company's Motion for Summary Judgment (#351)

Plaintiff seeks to hold Tulsa Screw Product Company ("Tulsa Screw") liable for the costs of cleanup of the Glenn Wynn site pursuant to the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA") for arranging for disposal of a hazardous substance on the Glenn Wynn site. It is undisputed that Tulsa Screw arranged for the disposal of waste materials on the

[1] The motions dealing with successor liability and the recoverability of EPA oversight costs are dealt with in separate orders filed simultaneously herewith.

site.[2] However, Tulsa Screw contends Plaintiff Atlantic Richfield Company ("ARCO") has failed to produce any evidence to support ARCO's contention that the materials generated by Tulsa Screw were "hazardous substances" as defined by CERCLA.

ARCO asserts that the composition of the waste produced by Tulsa Screw and deposited at the site is a fact question and therefore summary judgment is not appropriate. ARCO further argues that due to limited discovery, it is unable to present specific evidence regarding the composition of Tulsa Screw's waste.[3]

ARCO also contends that Tulsa Screw has the burden of proving that the material it generated fits within the "petroleum exclusion" of CERCLA, as Tulsa Screw asserts it does. However, ARCO has the initial burden of establishing that the materials generated by Tulsa Screw qualify as "hazardous substances" under CERCLA. 42 U.S.C. §9607(a)(4); See O'Neil v. Picillo, 682 F.Supp. 706 (D.R.I. 1988). ARCO has completely failed in this regard. Merely alleging that the material Tulsa Screw contributed to the site was "waste oil" is not sufficient. To create a question of fact, ARCO must produce some evidence that the "waste oil" contained sufficient levels of listed CERCLA substances. ARCO has not presented any evidence regarding the composition of Tulsa Screw's waste and has

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[2] Tulsa Screw refers to the material as "waste oil" or "used cutting oil" while ARCO documents refer to the material as "waste oil", "waste lube oil" or unidentified waste product.

[3] ARCO's response brief was filed August 31, 1992. Discovery is now complete and ARCO has failed to supplement its brief with any further evidence regarding the composition of Tulsa Screw's waste.

failed to establish a genuine issue of material fact.

If there is a complete failure of proof concerning an essential element of the non-movant's case, there can be no genuine issue of material fact because all other facts are necessarily rendered immaterial. Celotex Corp v. Catrett, 477 U.S. 317, 323 (1986). Upon review of the pleadings, exhibits, arguments of counsel and the relevant authority, the Court concludes there is no genuine dispute as to the nature of the waste deposited at the site by Tulsa Screw, due to ARCO's complete failure to present competent evidence on this issue. ARCO has failed to provide any evidence indicating that the Tulsa Screw waste was a "hazardous substance" as defined in CERCLA. For this reason, Tulsa Screw's Motion for Summary Judgment (Docket #351) should be and is hereby GRANTED.

Plaintiff's Motion for Summary Judgment Against Glenn Wynn and Vacuum & Pressure (Docket #491)[4]

ARCO's Motion for Summary Judgment Against Defendants Vacuum & Pressure Tank Truck Service and Glenn Wynn (the "Glenn Wynn Defendants") seeks judgment as to the following:

1. A finding of liability against the Glenn Wynn defendants;

2. A determination that the response selected by EPA was consistent with the National Contingency Plan ("NCP"); and

3. A determination that ARCO's response actions were consistent with the NCP and/or the Consent Decree, entered between the United States and ARCO in United States of America v. Atlantic Richfield Company, N.D.

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[4] The Magistrate Judge orally granted this motion at a hearing on January 15, 1993. However, a written report and recommendation was never filed and therefore the Magistrate's ruling will be set aside and this Court will review the motion *de novo*.

Okla., No. 89-C-447-B, October 10, 1990.

To establish liability on the part of Vacuum & Pressure Tank Truck Service ("V&P"), ARCO must prove (1) the waste disposal site is a "facility" within the meaning of 42 U.S.C. §9601(9); (2) a "release" or "threatened release" of any "hazardous substance" from the facility has occurred; (3) such "release" or "threatened release" has caused the Plaintiff to incur response costs that are "consistent with the national contingency plan," and (4) V&P operated the facility at the time of disposal of any hazardous substance. 42 U.S.C. §9607(a); Ascon Properties, Inc. v. Mobil Oil Co., 866 F.2d 1149, 1152-53 (9th Cir. 1989).

It is undisputed and the Court finds that (1) the Glenn Wynn site is a "facility"; (2) that substances disposed of at the site were "hazardous substances"; and (3) that V&P "operated" the facility at the time hazardous substances were disposed of at the facility. (Defendants Wynn and V&P's Response and Objection to ARCO's Motion for Summary Judgment, p. 25-26).

V&P disputes ARCO's contentions that (1) there has been a release or threatened release of hazardous substances; (2) ARCO has incurred necessary costs of response; and (3) ARCO has acted consistent with the NCP. The Court concludes V&P has failed to establish a genuine issue of material fact as to any of these issues and thus, summary judgment is appropriate. Celotex Corp v. Catrett, 477 U.S. 317,323 (1986).

As to the issue of "release or threat of release", V&P contends "based upon the information received and reviewed to date,

there has not been a satisfactory documentation of a release or threat of release." CERCLA defines "Release" as follows:

> The term "release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment.

42 U.S.C. §9601(22).

V&P specifically admits that a small portion of the products stored on the site by V&P "spilled or leaked onto the ground." (Defendants Wynn and V&P's Response and Objection to ARCO's Motion for Summary Judgment, p. 25). Furthermore, discovery is now complete and V&P has produced no competent evidence to dispute ARCO's allegations and evidence that a release of hazardous substances did occur at the site.

V&P also contests ARCO's contention that it has incurred "necessary costs of response." V&P argues ARCO may have incurred costs "substantially above and beyond 'necessary costs.'" However, it is not contested that ARCO has incurred some necessary response costs. In order to find V&P liable as an operator of the site, it is only necessary that ARCO have incurred some measurable amount of necessary response costs. Kelley v. Thomas Solvent Co., 727 F.Supp. 1532,1551 (W.D.Mich. 1989)(a determination of the amount of recoverable response costs is not necessary to a finding of liability for those costs). The Court concludes ARCO has incurred necessary response costs and that V&P, as operator of the site, is liable for such costs. The extent of such costs and resulting liability is a fact question which must be determined at trial.

Finally, V&P contends that ARCO has not acted consistent with

the National Contingency Plan.[5] The parties have thoroughly and completely briefed the "remedy selection" issue and the Court heard considerable evidence on the issue at the ARCO/Sand Springs Home good-faith settlement hearing.

The first issue before the Court is the retroactivity of the 1990 NCP requirements to cleanups commenced prior to 1990. The few courts having addressed this question concluded the 1990 NCP requirements should be applied retroactively to the extent that they clarify the prior 1985 NCP requirements, but should not be applied retroactively if they alter the 1985 NCP requirements and their application would result in manifest injustice. Hatco Corp. v. W.R. Grace & Co., 801 F.Supp. 1309 (D.N.J. 1992); and Con-Tech Sales Defined Benefit Trust v. Cockerham, 1991 WL 209791 (E.D.Pa. 1991).

The 1990 NCP added two provisions setting forth what action would be considered "consistent with the NCP" for the purpose of a cost recovery action under section 107(a)(4)(B). Specifically, the 1990 NCP provides:

> (3) For the purpose of cost recovery under section 107(a)(4)(B) of CERCLA:
>
> (i) A private party response action will be considered "consistent with the NCP" if the action, when evaluated as a whole, is in substantial compliance with the applicable requirements in paragraphs (c)(5) and (6) of this section, and results in a CERCLA-quality cleanup;
>
> (ii) Any response action carried out in compliance with ... a consent decree entered into pursuant to section 122 of CERCLA, will be considered "consistent with the NCP."

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[5] Group I has also raised this argument.

40 C.F.R. §300.700(c)(3). The Court concludes that subsections 300.700(c)(3)(i) and 300.700(c)(3)(ii) simply clarify the 1985 NCP by providing a standard to evaluate whether conduct is "consistent with the NCP." Hatco Corp., 801 F.Supp. at 1332. The Court also concludes that the retroactive application of these subsections would not result in manifest injustice.

Pursuant to section 300.700(c)(3)(ii), ARCO's response actions were "consistent with the NCP" if they were carried out in compliance with the Consent Decree entered by this Court in United States v. Atlantic Richfield Company, No. 89-C-447-B (N.D.Okla. Oct. 10, 1990), pursuant to 42 U.S.C. §9622. V&P does not dispute that ARCO's response actions were carried out in compliance with the Consent Decree. However, V&P argues that compliance with the Consent Decree should not be considered conclusive evidence that ARCO's actions were consistent with the NCP. The 1990 NCP provides otherwise. There is no genuine dispute as to ARCO's compliance with the Consent Decree and therefore, ARCO's response actions carried out in compliance with the Consent Decree were "consistent with the NCP." 40 C.F.R. §300.700(c)(3)(ii).

The Court concludes there is no genuine dispute as to any of the elements necessary to establish liability under 42 U.S.C. §9607(a) against V&P and thus, entry of partial summary judgment on the issue of liability is warranted. For the reasons set forth above, V&P shall be liable for ARCO's necessary response costs associated with the Glenn Wynn site, less any portion of liability ultimately attributed to ARCO. V&P is likewise liable pursuant to

42 U.S.C. §9613(g)(2) for any necessary future response costs incurred by ARCO at the Glenn Wynn site.

ARCO also seeks summary judgment on its §9613(f) contribution claim. V&P points out that this claim is dependant on the §9607 claim and contends a lack of discovery prevents a complete response. The Court has concluded V&P is liable under §9607 and furthermore, discovery is now complete. Therefore, partial summary judgment against V&P is appropriate on ARCO's §9613(f) claim as well.

ARCO also seeks summary judgment against Glenn Wynn personally. It is undisputed that Glenn Wynn (1) was president of V&P between 1956 and 1986; (2) was an incorporator of V&P; (3) was the sole owner and operator of V&P; and (4) was the sole owner and operator of Solvents Recovery, Inc., which also did business at the Glenn Wynn portion of the site.

A corporate officer or shareholder who manages the facility in question is an "operator" within the meaning of CERCLA. State of New York v. Shore Realty Corp., 759 F.2d 1032,1052 (2nd Cir. 1985). Glenn Wynn clearly qualifies as an "operator" under CERCLA and therefore, the analysis set forth above with respect to V&P is equally applicable to Glenn Wynn. For these reasons, ARCO's motion for partial summary judgment on its §9607, §9613(f) and 9613(g)(2) claims should be granted against Glenn Wynn in the same manner it was granted against V&P.

Third Party Defendant Gertrude M. Clift's Motion to Dismiss (Docket #602)

The Court has been advised by counsel for Group IV that the

third party complaint against Gertrude M. Clift and Cliftco, Inc., will be dismissed and therefore this motion is now moot.

Plaintiff's Motion to File Fourth Amended Complaint (Docket #834)

ARCO seeks to amend its Third Amended Complaint by deleting certain defendants and clarifying certain claims previous pled. ARCO also seeks to add a new claim for relief under the Oklahoma law of "unjust enrichment". ARCO's motion is denied to the extent it adds a claim for unjust enrichment, as such an amendment at this late date is untimely and prejudicial. In all other respects, ARCO's Motion to File Fourth Amended Complaint is hereby GRANTED.

Plaintiff's Motion for Partial Summary Judgment Against Certain Group I Defendants (Docket #884)

ARCO seeks summary judgment against all Group I defendants (except Cintas Corporation) as to (1) liability for the necessary response costs incurred by ARCO regarding the Glenn Wynn site which are consistent with the National Contingency Plan, pursuant to 42 U.S.C. §9607(a) and 40 C.F.R. Part 300; (2) liability for necessary response costs which ARCO incurs in the future regarding the Glenn Wynn site which are consistent with the NCP, pursuant to 42 U.S.C. §9613(g)(2); (3) liability to ARCO by way of contribution for all or part of the costs which ARCO has paid the United States in connection with the Glenn Wynn site, pursuant to 42 U.S.C. §9613(f); and (4) liability to ARCO by way of contribution for all or part of the costs ARCO may in the future pay to the United States or any other party for actions pertaining to the Glenn Wynn site.

ARCO agrees that the liability of these Group I Defendants

should be reduced by the percentage of liability, if any, attributable to ARCO[6] and that the dollar amount of liability for current costs is a fact question to be determined at trial.

As to Phillips Petroleum Company ("Phillips"), the Court concludes issues of material fact remain regarding Phillips' own clean-up efforts and the divisibility of Phillips' harm. Therefore, ARCO's motion for partial summary judgment is DENIED as to Phillips Petroleum Company.

The remaining Group 1 Defendants (except Cintas Corporation), have admitted liability for past and future necessary response costs incurred by ARCO related to the Glenn Wynn site, less any liability, if any, ultimately attributed to ARCO. The Court concludes there are no material facts in dispute regarding these Group 1 Defendants' liability to ARCO pursuant to 42 U.S.C §§9607(a), 9613(f) and 9613(g) related to the Glenn Wynn site, and therefore, ARCO's Motion for Summary Judgment against Certain Group 1 Defendants should be and is hereby GRANTED, except as to Phillips Petroleum.

Group III's Objection and Appeal of Court's Ruling on Protective Order re: Group I Discovery Request (Docket #926)

Group III Defendants object to an Order of the Magistrate Judge requiring Group III to produce documents regarding Glenn Wynn's financial affairs for the period of January 1, 1980, to the present. Although Group I has dismissed its fraudulent transfer claim, the Court concludes this discovery is still relevant to

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[6] This includes ARCO's equitable share of any orphan shares.

determine whether Glenn Wynn has transferred assets which remain under his control. Such evidence would be relevant in evaluating Wynn's financial ability to share in the cleanup effort. For this reason, Group III's Objection and Appeal is OVERRULED.

Group III's Motion for Partial Summary Judgment on Group I's Breach of Contract, Negligence and Fraudulent Transfer Claims (Docket #927)

Group I dismissed these cross-claims on September 9, 1993, and therefore this motion is now moot.

Group I and Group IV's Motion for Partial Summary Judgment Against ARCO (Docket #935)

Defendant Groups I and IV seek a declaration that ARCO is a liable party and a finding that ARCO is liable in contribution, under 42 U.S.C. §9613(f), for an equitable share of all past and future necessary response costs incurred, or to be incurred at the Glenn Wynn portion of the Sand Springs Petrochemical Complex ("the Site"), that are consistent with the National Contingency Plan. These Defendant Groups seek a judgment against ARCO for ARCO's portion of responsibility, despite the fact this Court has repeatedly stated that ARCO is not entitled to a judgment for that portion of the necessary costs, if any, for which it is factually responsible. Furthermore, CERCLA expressly prohibits contribution actions against defendants, such as ARCO, who have settled their liability to the government. 42 U.S.C. §9613(f)(2). For these reasons, Group I and Group IV's Motion for Partial Summary Judgment against ARCO should be and is hereby DENIED.

Group III's Motion to Set Case for Jury Trial (Docket #944)

Group III contends it is entitled to a jury trial on all of

the claims remaining in this case. The majority of Courts addressing the issue have concluded there is no right to a jury trial in cost recovery actions brought under CERCLA. *E.g.*, United States v. Northeastern Pharmaceutical & Chemical Co., 810 F.2d 726 (8th Cir. 1986), cert denied, 484 U.S. 848 (1987); Wehner v. Syntex Corp., 682 F.Supp. 39 (N.D.Cal. 1987). This Court agrees.

Group III also asserts it is entitled to a jury trial on its cross-claims and counterclaim. All remaining parties to this case (including Group III)[7] were represented at the April 15, 1993, hearing in which this Court discussed the trial schedule with counsel. The Court specifically solicited any comments on whether the case should be set for a nonjury trial. All counsel present agreed, either verbally or through their silence, that this matter should be set on the nonjury docket and should be tried to the Court. Neither Group III nor any other party asked for a jury trial on any issue. The Court concludes Group III waived its right to a jury trial by sitting on its hands at the April 15 hearing and therefore Group III's motion for a jury trial is hereby DENIED. All matters remaining in this case will be tried to the Court.

Plaintiff's Motion in Limine (Docket #966)

ARCO moves the Court to preclude the defendants from presenting evidence at trial regarding (1) the EPA's selection of the remedy at the site and (2) the negotiations of the Consent Decree approved by this Court for the implementation of the

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[7] The transcript of the April 15, 1993, hearing indicates that both counsel of record for Group III were present.

selected remedy. The Court heard considerable evidence on this subject at the ARCO/Sand Springs Home settlement hearing and has now concluded that ARCO's response actions carried out in compliance with the Consent Decree were "consistent with the NCP." The Court concludes additional evidence regarding remedy selection and/or negotiations of the Consent Decree would be duplicative and unnecessary for resolution of the issues remaining before the Court. For this reason, Plaintiff's Motion in Limine is GRANTED.

Glenn Wynn's Motion in Limine (Docket #1035)

Glenn Wynn moves the Court to exclude from use at trial any documentary or testimonial evidence concerning Wynn's ownership in or membership to Southern Hills Country Club. Wynn contends such evidence is cumulative, unnecessary and highly prejudicial. ARCO contends this evidence is relevant to determining the financial resources of Wynn and his ability to pay any judgment against him. The Court concludes any reference to Wynn's membership to Southern Hills Country Club would be prejudicial and is unnecessary to determine his financial resources. For this reason, Wynn's Motion in Limine should be and is hereby GRANTED.

In summary, the Court rules on the various pending motions as follows: Tulsa Screw Product Company's Motion for Summary Judgment (Docket #351) is GRANTED; Plaintiff's Motion for Summary Judgment Against Glenn Wynn and Vacuum & Pressure (Docket #491) is GRANTED to the extent set out herein; Third Party Defendant Gertrude M. Clift's Motion to Dismiss (Docket #602) is moot; Plaintiff's Motion to File Fourth Amended Complaint (Docket #834) is GRANTED in part

and DENIED in part as set out herein; Plaintiff's Motion for Partial Summary Judgment Against Certain Group I Defendants (Docket #884) is GRANTED as set out herein; Group III's Objection and Appeal of Court's Ruling on Protective Order re: Group I Discovery Request (Docket #926) is OVERRULED; Group III's Motion ~~for~~ Partial Summary Judgment on Group I's Breach of Contract, Negligence and Fraudulent Transfer Claims (Docket #927) is moot; Group I and Group IV's Motion for Partial Summary Judgment Against ARCO (Docket #935) is DENIED; Group III's Motion to Set Case for Jury Trial (Docket #944) is GRANTED in part and DENIED in part as set out herein; Plaintiff's Motion in Limine (Docket #966) is GRANTED; and Glenn Wynn's Motion in Limine (Docket #1035) is GRANTED.

IT IS SO ORDERED, this 15th day of October, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ATLANTIC RICHFIELD COMPANY, Plaintiff,	)	
vs.	)	Case No. 89-C-868-B
	)	89-C-869-B
AMERICAN AIRLINES, INC., et al.,	)	89-C-859-B
Defendants.	)	

O R D E R

The Court has for decision the following motions for summary judgment concerning successor in interest or continuing enterprise issues: Motion for Summary Judgment of Container Products, Inc. and Container Products of Oklahoma (Docket #859); Defendant Cintas Corporation's Motion for Summary Judgment (Docket #933); Motion for Summary Judgment of Defendant James Miller (Docket #938) and Motion for Summary Judgment of Defendant, Miller Truck Lines, Inc. (Docket #940).

The Standard of Fed.R.Civ.P. 56 Motion for Summary Judgment

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Windon Third Oil & Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

> "The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time

> for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. Conaway v. Smith, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980).

A recent Tenth Circuit Court of Appeals decision in Committee for the First Amendment v. Campbell, 962 F.2d 1517 (10th Cir. 1992), concerning summary judgment states:

> "Summary judgment is appropriate if 'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.' . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination. . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be 'merely colorable' or anything short of 'significantly probative.' . . .
>
> "A movant is not required to provide evidence negating an opponent's claim. . . . Rather, the burden is on the nonmovant, who 'must present affirmative evidence in order to defeat a properly supported motion for summary judgment.' . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the

evidence probably is in possession of the movant. (citations omitted). *Id.* at 1521."

Motion for Summary Judgment of Defendants Container Products, Inc., and Container Products of Oklahoma (Docket #859)

Container Products, Inc., and Container Products of Oklahoma (collectively "Container Products") seek summary judgment pursuant to Fed.R.Civ.P. 56. ARCO asserts these Defendants are successors in interest to Drum Services Company, Inc. The Court hereby overrules Container Products' Motion for Summary Judgment because issues of material fact remain regarding successor in interest and/or continuity of enterprise issues.

Defendant Cintas Corporation's Motion for Summary Judgment (Docket #933)

Cintas Corporation seeks summary pursuant to Fed.R.Civ.P. 56 on the grounds Cintas did not arrange for the disposal, treatment, or transportation of any alleged hazardous substance, and Cintas is not a successor in interest under CERCLA. The Court sustains Cintas Corporation's Motion for Summary Judgment because the uncontroverted material facts support the conclusion that Cintas was neither a successor in interest nor a continuing enterprise of Industrial Uniform and Towel Supply, Inc. ("IUTS"). Louisiana-Pacific Corp. v. Asarco, Inc., 909 F.2d 1260,1263 (9th Cir. 1990). See also, Pulis v. United States Electrical Tool Co., 561 P.2d 68 (Okla. 1977); Williams v. Bowman Livestock Equipment Co., 927 F.2d 1128 (10th Cir. 1991). Regarding continuity of enterprise see: United States v. Carolina Transformer Co., 978 F.2d 832 (4th Cir. 1992); and United States v. Distler, 741 F.Supp. 637 (W.D.Ky.

1990).

Cintas was not involved in arranging for disposal, treatment or transportation of alleged hazardous substance to the Glenn Wynn site.

Cintas, a larger publicly traded company, bought the plant and equipment assets of IUTS and customer contracts. The purpose of the purchase was to expand the business of Cintas. New management was instituted and IUTS ceased operation as no commonality of ownership or management remained. The purchase of IUTS assets by Cintas was made before Cintas had any knowledge of potential CERCLA claims regarding the Sand Springs Petrochemical Complex or more specifically, the Glenn Wynn site.

Motion for Summary Judgment of Defendant James Miller (Docket #938) and Motion for Summary Judgment of Defendant Miller Truck Lines, Inc. (Docket 940)

The Motion for Summary Judgment of Miller Truck Lines, Inc., is sustained. The uncontroverted material facts reveal that Miller Truck Lines, Inc., is a separate legal entity formed after Miller Trucking Company had gone into bankruptcy. It is neither a successor or a continuing enterprise of Miller Trucking Company. Louisiana-Pacific Corp. v. Asarco, Inc., 909 F.2d 1260,1263 (9th Cir. 1990). See also, Pulis v. United States Electrical Tool Co., 561 P.2d 68 (Okla. 1977); Williams v. Bowman Livestock Equipment Co., 927 F.2d 1128 (10th Cir. 1991). Regarding continuity of enterprise see: United States v. Carolina Transformer Co., 978 F.2d 832 (4th Cir. 1992); and United States v. Distler, 741 F.Supp. 637 (W.D.Ky. 1990).

There is insufficient evidence in the record to create a fact question that Miller Brothers Trucking ever existed as a legal entity. Miller Truck Lines, Inc., provided no hazardous materials to the Glenn Wynn site as it was formed in 1983 and the bankrupt Miller Trucking Company's last deliveries to Glenn Wynn terminated in 1982.

The Motion for Summary Judgment of James Miller is overruled because factual issues remain regarding his control or authority to control hazardous substance deliveries to the Glen Wynn site, as president of Miller Trucking Company during the years previous to 1978.

In summary, the Motion for Summary Judgment of Container Products, Inc. and Container Products of Oklahoma (Docket #859) is hereby DENIED; Defendant Cintas Corporation's Motion for Summary Judgment (Docket #933) is hereby GRANTED; the Motion for Summary Judgment of Defendant James Miller (Docket #938) is hereby DENIED and the Motion for Summary Judgment of Defendant, Miller Truck Lines, Inc. (Docket #940) is hereby GRANTED.

IT IS SO ORDERED, this 15th day of October, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ATLANTIC RICHFIELD COMPANY,

Plaintiff,

vs.

AMERICAN AIRLINES, INC., et al.,

Defendants.

Case No. 89-C-868-B
89-C-869-B
89-C-859-B

O R D E R

The Court has for decision ARCO's Motion for Clarification of Order filed August 3, 1993, Granting Group I's Motion for Partial Summary Judgment (Docket #924) and Group III and Group I's Motion for Partial Summary Judgment on the Recoverability of EPA Oversight Costs (Docket #930 and #1028).

ARCO is correct in that the Court's Order (Docket #912) filed August 3, 1993, intended only to cover litigation and nonlitigation attorney's fees. The recoverability of administrative costs is a question of fact to be hereafter decided based upon whether such particular administrative costs are necessary and reasonable costs of response. The Court's Order of August 3, 1993, (Docket #912) is amended accordingly.

For the same reason, Group III and Group I's Motion for Partial Summary Judgment on the Recoverability of EPA Oversight Costs (Docket #930 and #1028) is overruled. The oversight costs ARCO seeks to recover are by way of contribution for costs ARCO was required to pay under the consent decree approved by the Court. A factual issue remains concerning whether such costs are recoverable

response costs. Group I and III's reliance on United States v. Rohm & Haas Co., ___ F.2d ___, 1993 WL 303148 (3rd Cir. Feb. 12, 1993) is misplaced as it is distinguishable. In Rohm, the subject EPA oversight costs had not been paid by a private party pursuant to a consent decree.

For the reasons set above, ARCO's Motion for Clarification (Docket #924) is GRANTED as set out herein, and Group III and Group I's Motion for Partial Summary Judgment on the Recoverability of EPA Oversight Costs (Docket #930 and #1028) is DENIED.

IT IS SO ORDERED, this 1st day of October, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LOYAL TAYLOR, D/B/A TAYLOR FREIGHT AGENCY, and UFO CONTRACTING,
Plaintiff,

vs.

SUPERIOR EXPRESS SERVICE, INC., a foreign corporation, and TRANS-OHIO HAULERS, INC., a foreign corporation,
Defendants.

Case No. 91-C-840-B

O R D E R

Now before the Court is the Defendant's, Superior Express Service, Inc. (Superior), motion for summary judgment with respect to Count Three of Plaintiff's, Loyal Taylor, d/b/a Taylor Freight Agency and UfO Contracting (Taylor), Complaint (docket #31), filed August 5, 1993.

Undisputed Facts

Superior issued checks to Taylor in the amount of $5,459.31, in February, 1991. Simultaneously, Superior promised to wire an additional $10,000.00 to him. In reliance on the checks, and the promise to wire funds, Taylor issued approximately $15,000.00 in checks to his creditors. Subsequently, Taylor learned that Superior had stopped payment on the checks totalling $5,459.31. Taylor alleges that he incurred $40,250.00 in damages from Superior stopping payment on the checks because he had to sell his home at

a loss of $40,000.00 in order to cover the checks he had written, and he incurred approximately $250.00 in bank charges. Taylor eventually received payment for the obligation by the checks upon which payment was stopped.

Legal Analysis

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Windon Third Oil & Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

> "The plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986).

Superior moves for summary judgment, relying on Okla. Stat. Ann tit. 12A, §3-802[1] arguing that Taylor could not bring suit on the obligation because payment had been made on the instrument. §3-

[1] This provision has been repealed, but was in effect at the time of the transaction in question.

802 provides, in pertinent part, as follows:

> (1) Unless otherwise agreed where an instrument is taken for an underlying obligation...
>
> > (b)... the obligation is suspended pro tanto until the instrument is due or if it is payable on demand until its presentment. If the instrument is dishonored action may be maintained on either the instrument or the obligation. An action may not be maintained on the obligation without an offer to surrender the instrument to the obligor or into court, or by giving security indemnifying the obligor against loss by reason of further claims on the instrument. Discharge of the underlying obligor in the instrument also discharges him on the obligation.

Plaintiff argues that §3-802 is inapplicable because there has not been a "discharge of the underlying obligor (Superior) on the instrument."

Taylor frames his claim as a breach of warranty claim, and thus the question is whether Taylor is entitled to consequential damages on this claim, and, if so, whether he waived his right to consequential damages by accepting payment for the checks on which payment had been stopped. The Oklahoma Commercial Code, Okla. Stat. Ann. tit. 12A, §1-106 provides for the following remedies:

> (1) The remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special nor penal damages may be had except as specifically provided in this Act or by other rule of law.

This statute has been interpreted to mean that Plaintiff may receive punitive damages in an action brought pursuant to the commercial code even though punitive damages are not provided for in the commercial code, if they would be allowed under some other

existing law. Davidson v. First Bank and Trust Co., Yale, 609 P.2d 1259 (Okla. 1976). In the present case, Plaintiff argues that consequential damages are allowed for his breach of warranty claim pursuant to Okla. Stat. Ann. tit. 23, §21, which provides:

> For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this chapter, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom. No damages can be recovered for a breach of contract, which are not clearly ascertainable in both their nature and origin.

However, Plaintiff's claim is based on the failure to pay the money in a timely manner, because of the stop payment order issued by Defendant. Oklahoma law specifically addresses the damages available on a claim for breach of obligation to pay money as follows:

> The detriment caused by the breach of an obligation to pay money only is deemed to be the amount due by the terms of the obligation, with interest thereon.

Okla. Stat. Ann. tit. 23, §22. Thus, Plaintiff is not entitled to the damages he seeks by either the commercial code, or any other rule of law. Defendant's motion for summary judgment is therefore granted as to Plaintiff's third claim.

IT IS SO ORDERED THIS 4th DAY OF ~~SEPTEMBER~~ Oct., 1993.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

DATE OCT 5 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MID-AMERICAN INDEMNITY INSURANCE COMPANY,

Plaintiff,

vs.

A.J.W. ENTERPRISES, INC., d/b/a BRONCO'S and ANGELA SPENCER,

Defendants.

Case No. 93-C-115-B

ORDER

The matter comes on for consideration of Plaintiff's Motion For Default Judgment (docket #3).

Plaintiff filed this action February 9, 1993, alleging that it had issued a policy of insurance to Defendant A.J.W. Enterprises, Inc. d/b/a as Bronco's (AJW). AJW is allegedly an Oklahoma corporation suspended for non-payment of franchise tax pursuant to state law. The Defendant Angela Spencer (Spencer) alleges she is the widow of David Spencer who was fatally injured in a vehicle accident on August 10, 1991. Plaintiff alleges Spencer[1] has filed suit in Rogers County District court, State of Oklahoma, charging that Travis Summers, operating his vehicle in a negligent manner, caused the death of David Spencer and that Defendant Bronco's served alcoholic beverages to Summers and his wife (both minors at the time) prior to the accident thereby causing the injury and

[1] individually, as custodian of the children of David Spencer, deceased, and as personal representative of the Estate of David Spencer, deceased

death.

It appears from the record that apparent service was made upon AJW by personally serving its service agent Alvin J. Walkner on July 7, 1993. However, Plaintiff's Complaint alleges AJW was suspended effective December 14, 1992 for non-payment of the franchise tax pursuant to 68 O.S. §1212. The Court concludes an issue may exist as to the validity of service upon AJW.

Further, the affidavit offered by Plaintiff's counsel to support the entry of default judgment has not been notarized making same an unsworn statement. The Court concludes as issue may exist as to this matter.

Lastly, the Default pleadings do not indicate that opposing counsel, i.e. the attorney for Angela Spencer, was served with these pleadings. In light of Plaintiff's Complaint seeking an adjudication that it owes no obligation to AJW to either defend or indemnify because of its failure to cooperate, and further seeking an adjudication as to the rights of Angela Spencer *viz-a-viz* the policy of insurance issued to AJW by Plaintiff, the Court concludes the present Motion for Default Judgment should be DENIED. Accordingly, the Entry of Default (docket #5) is hereby vacated.

The parties are directed to file within twenty days from the date hereof briefs stating their positions on the above issues.

IT IS SO ORDERED, this 4 day of October, 1993.

THOMAS R. BRETT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

EL-O-MATIC USA, INC., a Delaware corporation,

Plaintiff,

vs.

INTEGRAL SOLUTIONS, INC., an Oklahoma corporation, and WALTER A. JOHNSON,

Defendants.

Case No. 93-C-126-E

DISMISSAL WITHOUT PREJUDICE

Plaintiff EL-O-MATIC USA, Inc. dismisses its claims against Defendant Walter A. Johnson without prejudice pursuant to Federal Rule of Civil Procedure 42(a)(1)(i).

GEORGE H. LOWREY, OBA #10888

By: _____

CONNER & WINTERS
2400 First National Tower
15 East 5th Street
Tulsa, OK 74103-4391
(918) 586-8554

Attorneys for Plaintiff
EL-O-MATIC USA, INC.

Certificate of Service

I certify that on October 5, 1993, I mailed a copy of the attached document to each of the following:

Ms. Janine H. VanValkenburgh
Epperson & Johnson
201 West Fifth Street
Suite 400
Tulsa, Oklahoma 74103-4211

Mr. John M. Hickey
Barber & Bartz
One Ten Occidental Place
110 West 7th Street
Suite 200
Tulsa, Oklahoma 74119-1018

Mr. John D. Russell
Trial Attorney
Tax Division
U.S. Department of Justice
P.O. Box 7238
Ben Franklin Station
Washington, D.C. 20044

George H. Lowrey

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

M & F LEASING CORPPRATION,

Plaintiff,

vs.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,

Defendant.

Case No. 93-C-489-E

STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW M & F Leasing Corporation, Plaintiff herein, and St. Paul Fire and Marine Insurance Company, Defendant herein, and pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure do stipulate to dismiss the above styled and numbered cause, and all claims asserted therein, with prejudice to the refiling thereof.

Respectfully submitted,

Stephen L. Oakley, OBA #6731
SEIGEL & OAKLEY
250 Law Building
500 West Seventh Street
Tulsa, OK 74119-1012
(918)587-3147

ATTORNEY FOR PLAINTIFF M & F LEASING CORPORATION

Phil R. Richards, OBA #10457
RICHARDS, PAUL, RICHARDS & SIEGEL
Nine East Fourth Street, Suite 400
Tulsa, OK 74103-5118
(918)584-2583

ATTORNEY FOR DEFENDANT ST. PAUL FIRE AND MARINE INSURANCE COMPANY

(4471)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ELLEN ANN TAYLOR,

Plaintiff,

vs.

TULSA HOUSING AUTHORITY, et al.,

Defendants.

No. 93-C-845-E

ORDER and JUDGMENT

COMES NOW BEFORE THE COURT the above styled action for preliminary injunction. Being fully advised in the premises, the Court finds that Plaintiff has failed to state an action upon which relief can be granted, and therefore dismissal at this stage is warranted, pursuant to Federal Rule of Civil Procedure 12(b)(6).

IT IS THEREFORE ORDERED ADJUDGED AND DECREED that this action is hereby dismissed on the merits.

ORDERED this 1st day of October, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

LOYD GRIFFIN, as Personal Representative of the Estate of SHIRLEY JEAN DOLLINS, Deceased,	
Plaintiff,	
vs.	
UNITED STATES OF AMERICA,	
Defendant.	***CIVIL ACTION NO. 93-C-244-E***

ORDER

This matter comes on before the court on Defendant's Motion to Dismiss or in the Alternative for Summary Judgement. The court finds that in light of its Order of Dismissal entered on August 27, 1993, in the case of David Holt, Plaintiff v. United States of America, Defendant, Northern District of Oklahoma, Case Number 92-C-601-E, and in light of Plaintiff's Confession of Defendant's Motion, Defendant's Motion to Dismiss for want of subject matter jurisdiction should be granted and this case is accordingly dismissed, parties to bear their respective costs and attorney's fees.

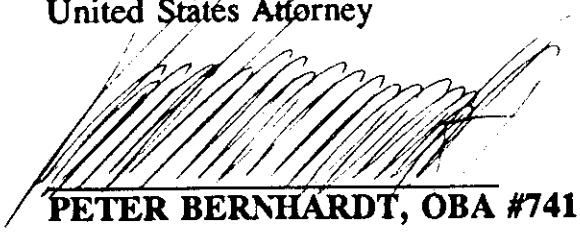
It is so ordered this 1st day of October, 1993.

S/ JAMES O. ELLISON

JAMES O. ELLISON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



PETER BERNHARDT, OBA #741
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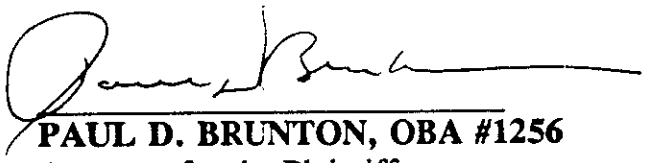
and



PAUL D. BRUNTON, OBA #1256
Attorney for the Plaintiff
610 S. Main Street, Suite 312
Tulsa, OK 74119-1258
(918)583-3600

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARVIN R. WASHINGTON,)
)
Plaintiff,)
)
v.) Case No. 92-C-410-B
)
RON CHAMPION, et al.,)
)
Defendants.)

ORDER

The court has for consideration the Report and Recommendation of the Magistrate Judge filed September 13, 1993, in which the Magistrate Judge recommended that Defendants' Motion for Summary Judgment be granted. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the court has concluded that the Report and Recommendation of the Magistrate Judge should be and hereby is affirmed.

It is therefore Ordered that Defendants' Motion for Summary Judgment is granted.

Dated this 15 day of ~~September~~ October, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DOLORES L. FITZGERALD,

Plaintiff,

vs.

PHOENIX MUTUAL LIFE INSURANCE COMPANY,

Defendant.

Case No. 93-C-565-B

DISMISSAL WITH PREJUDICE

Now on this 4th day of Oct., 1993, comes on for hearing the Joint Application for Dismissal with Prejudice. The Court being fully advised in the premises,

IT IS ORDERED that this action shall, and it hereby is, DISMISSED WITH PREJUDICE.

S/ THOMAS R. BRETT

District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FRED MARVEL, ET AL Plaintiffs, vs. AMERICAN GENERAL FINANCIAL CENTER THRIFT CO., ET AL Defendants	)	92-C-0206-B

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE REGARDING DEFENDANT AGFI'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION, FAILURE TO TIMELY FILE AND FOR FAILURE TO STATE A CAUSE OF ACTION

This order addresses the following motions:

a. Defendant American General Finance, Inc.'s ("AGFI's") Motion to Dismiss (docket #104), filed February 23, 1993.

The Motion is discussed, as follows.

a. Defendants' Motion to Dismiss (docket #104), Filed February 23, 1993

Defendant American General Finance, Inc. ("AGFI") moves to dismiss the original Complaint on several grounds, as follows:

(1) AGFI first contends that the First Amended Complaint was not timely filed, hence should be dismissed as violative of the court's Scheduling Order.

(2) AGFI next adopts AGFCTC's Motion to Dismiss for lack of personal jurisdiction;

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(3) AGFI further asserts that the claims as made against it fail to state a claim for which relief may be granted pursuant to Rule 12(b)(6), *Federal Rules of Civil Procedure*.

Each issue is addressed below.

(1) The First Amended Complaint Was Not Timely Filed

AGFI contends that Plaintiffs "violated the Scheduling Order and have not demonstrated a persuasive reason to add AGFI at this late date." *(Brief In Support of Motion to Dismiss, at p. 3)*. More particularly, the First Amended Complaint (docket #60) was filed on January 7, 1993. At that time the court's Scheduling Order was still effective, setting any further motion for joinder to be filed no later than **November 6, 1993.** Thereafter, on March 1, 1993 the undersigned struck the Scheduling Order pending a determination whether this matter would in whole or in-part proceed as a "class action". Various Motions to Dismiss remained pending at that time and prior to the filing of the amended complaint.

The question for determination at this date is whether, given the status of the case, an amendment, adding the alleged corporate "parent" as a party, may be accomplished. While Defendant's objection may have carried more weight prior to the striking of the Scheduling Order, it must be considered in the present context, *i.e.,* in the absence of a Scheduling Order. Seeming to complicate the issue is the fact that Plaintiffs never formally sought leave to amend. However, the undersigned notes that an issue long raised by Plaintiffs' counsel in open court, well before the filing of the First Amended Complaint was the very question now posited by the new filing -- is American General Financial

Center Thrift Company the proper party defendant, or, is it a corporate subsidiary of yet another corporation? More to the point, leave was not sought to amend, based on Plaintiffs' assertion that amendment was accomplished before a "responsive pleading" was filed (*Rule 15(a), Federal Rules of Civil Procedure).*

Given the foregoing, the undersigned finds as follows.

Rule 15(a), *Federal Rules of Civil Procedure* provides that a party may amend its pleadings once as a matter of course at any time before a responsive pleading is served. Recognized pleadings are listed in Rule 7(a), *Federal Rules of Civil Procedure* as a complaint, an answer, a reply to a counterclaim denominated as such, an answer to a cross-claim, a third-party complaint, and a third-party answer. "No other pleading shall be allowed." *Id.* **Ordinarily a motion to dismiss is not deemed a responsive pleading.** (Emphasis the court's.) *Glenn v. First National Bank,* 868 F.2d 368 (10th Cir. 1989), citing, *Cooper v. Shumway,* 780 F.2d 27, 29 (10th Cir. 1985).

Consequently, amendment can occur as of right after Plaintiff received the Motion to Dismiss and prior to the court's decision. *Id.*

As amendment occurred prior to any decision by the court on the pending motions to dismiss it was as of right. *Rule 15(a), Federal Rules of Civil Procedure.* Accordingly, it is the recommendation of the United States Magistrate Judge that AGFI's Motion to Dismiss based upon an "untimely" filing of the First Amended Complaint be **denied.**

(2) AGFI's Motion to Dismiss for Lack of Personal Jurisdiction

AGFI adopts the pleadings of AGFCTC, alleging that it has "*neither the requisite continuous and systematic contacts that would subject it to "general" jurisdiction of this Court*

nor has American General's conduct with respect to the Marvel's investment provided this Court with special jurisdiction over American General."

a. The Facts

The pertinent facts of this case are not complicated. Plaintiffs, Fred and Angela Marvel are Oklahoma residents who subscribe to a nationally circulated weekly publication (akin to a newspaper in format) entitled "100 Highest Yields".

Defendant AGFCTC is a licensed California company authorized by virtue of its licensure to issue "Thrift Investment Certificates" ("TIC's") in the State of California. Defendant AGFCTC is not authorized to issue Certificates of Deposit ("CD's"). Defendant "faxed" its "investment" rates to various entities, including "100 Highest Yields" on a "weekly basis". *(See, Deposition of Ronald G. Althof, at pp.36-39).* Defendant's weekly rates were then published by "100 Highest Yields" as shown in the December 17, 1990 issue, attached as "Exhibit 6" to Plaintiff's Appendix to Motion to Modify Scheduling Order, Volume 2; and for further example *see, Deposition Exhibits to Deposition of Robert Heady,* Appendix to Plaintiffs' Response to Motion to Dismiss, Volume VI. "100 Highest Yields" is published in Palm Beach, Florida and is owned by Defendant Financial Rates, Inc.

Defendant AGFCTC knew that "100 Highest Yields" is a nationally circulated publication. *(see, Deposition of Wendell Straughn, at p. 14, Plaintiffs' Appendix to Response to Motion to Dismiss, Volume V).*

Plaintiff Fred Marvel contacted Defendant AGFCTC by dialing its national "toll-free" "800 number", 1-800-621-7979 *(See, Affidavit of Fred Marvel, appended to Plaintiffs' Response to Motion to Dismiss (docket #78), ¶ (2)).*

Plaintiff spoke with "Brenda Guy" and confirmed the rates as he had seen them in the "100 Highest Yields" publication. Ms. Guy "agreed to lock in the rate she had quoted" and Plaintiff sent "by overnight delivery from Tulsa, Oklahoma to San Francisco, California" "a check for a $50,000.00 5-year CD at the quoted rate..." *(See, Affidavit of Fred Marvel, at ¶ (4)).*

Plaintiff received from Defendant AGFCTC a "Disclosure for Full Paid Certificate" on January 3, 1991. *(Id. at ¶ (8))*, together with a copy of the "Certificate" itself *(Id.))*. At the same time, Plaintiff also received a "signature card" so that the account could be set up as a "joint account" with he and his wife. A self-addressed/stamped envelope was enclosed by AGFCTC for the purpose of returning the executed "signature card". *(Id. at ¶ (11))*. Plaintiff and others who deposited monies with AGFCTC received these documents together with a "safekeeping" letter, found as "Exhibit 19", Appendix to Plaintiffs' Motion to Modify Scheduling Order, Volume 2.

Thereafter, Plaintiff received "monthly statements" from AGFCTC regarding their account; also receiving a "Statement of Condition", same being a financial statement of the "condition" of AGFCTC. *(Id. at ¶ (13))*. With the deposit by Plaintiff, he and his wife became "customers" of AGFCTC. *(Affidavit of Ronald G. Althof, at p.53)*.

AGFCTC did business with thirty-three Oklahoma residents, including individuals and other businesses, all listed at "Exhibit C", Appendix to Plaintiffs' Response to Motion to Dismiss, Volume I. The total amount of deposits generated by Oklahoma "customers" was $2,357,421 ($2.35 million). *(Id.)* Nationally, AGFCTC received deposits from "customers" totalling $400 million *(¶ (22), Plaintiffs' Response to Motion to Dismiss)*,

maintaining from 1700 to 1800 customer accounts from customers outside the State of California *(see, ¶ (22), Plaintiffs' Response to Motion to Dismiss).*

b. Analysis

Defendant's Motion is predicated upon Rule 12(b)(2), *Federal Rules of Civil Procedure*. Defendant seeks to dismiss the action against it, asserting lack of personal jurisdiction. Plaintiffs plead in their First Amended Complaint that

> **All of the acts described herein as being done by AGFCTC are imputed in law to AGFI, the parent of AGFCTC...because AGFCTC was the alter ego of AGFI or because AGFCTC was the agent of AGFI, and AGFI did plan, direct, authorize, participate in or ratify such acts at all times pertinent to the action.** *First Amended Complaint at p.5, ¶ ("I").*

Allegations in the Plaintiffs' First Amended Complaint are presumed true when considered in the context of a Rule 12 motion, as here. *Jackson v. Integra, Inc.,* 931 F.2d 678 (10th Cir. 1991), *citing, Curtis Ambulance of Fla., Inc. v. Board of County Comm'rs,* 811 F.2d 1371, 1374 (10th Cir. 1987). Thus, Plaintiffs' allegations of *alter ego*, or, alternately, of *agency,* must be treated, for purposes of a Rule 12 motion, as true.[1]

A discussion of minimum contacts must necessarily embrace the direct actions of AGFCTC, which, as pled may be imputed to AGFI. If minimum contacts exist such that AGFCTC may be held to the action, so then, must AGFI, under the pleadings now before the court. An analysis of applicable law governing the question of personal jurisdiction follows.

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[1] *Regarding "alter ego" see, Frazier v. Bryan Memorial Hosp. Authority, 775 P.2d 281, 288 (Okla. 1989); Tara Petroleum Corp. v. Hughey, 630 P.2d 1269, 1275 (Okla. 1981); and In Re: Fitzgerald, DeArman & Roberts, Inc., 129 BR 652, 657 (Bkcy. ND Okla. 1991).*

Due process requires that an individual not be subject to binding judgments of a forum with which he has established no meaningful "contacts, ties, or relations". *International Shoe Company v. Washington, supra,* 326 U.S., at 319.[2]

At issue is whether Defendant's contacts with the forum state create a "substantial connection" sufficient for the court to exercise personal jurisdiction. *Burger King Corporation v. Rudzewicz,* 471 U.S. 462, 475, 105 S.Ct. 2174, 2183, 85 L.Ed.2d 528 (1985). Critical to this analysis are two factors:

(1) Whether "minimum contacts exist in the forum state sufficient to warrant the exercise of jurisdiction; and

(2) Whether such contacts have been "intentionally established" by some act of Defendant whereby it avails itself of the privilege of conducting activities within the forum state. *Id.*

The ultimate question to be thus resolved is whether jurisdiction is to be exercised under circumstances that would otherwise offend "traditional notions of fair play and substantial justice". *International Shoe Company v. Washington, supra,* 326 U.S., at 316. The factors to be considered in determining whether jurisdiction should be exercised include:

(1) The interest of the forum state, and the Plaintiff's interest in obtaining relief;

---

[2] *Thus, the forum state does not exceed its powers under the due process claus if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state, and those products subsequently injure forum customers. Worldwide Volkswagen Corporation v. Woodson, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d for 90 (1980). Likewise, a publisher who distributes magazines in a distant state may be held accountable in that forum for damages as a result of allegedly defamatory story. Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984). As regards interstate contractual obligations, parties who "reach out beyond one state and create continuing relationships and obligations with citizens of another state" are subject to regulation and sanctions in the other state for the consequences of their activities. Travelers Health Association v. Virginia, 339 U.S. 643, 647, 70 S.Ct. 927, 929, 94 L.Ed.1154 (1950).*

(2) The interstate judicial system's interest in obtaining the most efficient resolution of controversies; and

(3) The shared interest of the several states in furthering fundamental substantive social policies. *Asahi Metal Industries v. Superior Court of California, supra*, 107 S.Ct. at 1034.

In the instant case, the question is whether a substantial connection exists with the forum state, sufficient to justify this court's exercise of jurisdiction. In this regard the Court must examine whether there exist constitutionally mandated "minimum contacts" with the forum state; looking particularly to the actions of the Defendant to determine whether it had purposefully availed itself of the privilege of conducting activities within this state. (*Asahi Metal Industries v. Superior court of California, supra*, 107 S.Ct. at 1033; *Hanson v. Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958)).

Of note is the holding in *Yankee Metal Products Company v. The District Court of Oklahoma County,* 528 P.2d 311, 313 (Okl. 1974). There, the Oklahoma Supreme Court found that "active participation" by a "nonresident buyer...in negotiations and plans for production" made the out-of-state resident more than a mere "passive purchaser", as would be a "mail order catalogue" consumer and subjected him to the "long-arm jurisdiction" of the court. Analogously, AGFCTC's out-of-state contact with Plaintiffs is "active" rather than "passive".

More to the point, Defendant maintains a "toll-free 800" telephone number; had during a one year period from June 1, 1990 through June 1, 1991 more than 1700 customer accounts outside the State of California; did business with more than 30

Oklahoma customers, depositing in excess of $2 million as a result; weekly "faxed" its changing certificate rates to "100 Highest Yields", a national publication, headquartered in Palm Beach, Florida;[3] sent regular (*i.e., monthly*) statements to each of its customers, including those in Oklahoma; required its customers to send back "signature cards" in self-addressed/stamped envelopes; corresponded with its out-of-state customers in Oklahoma, sending monthly statements and a "Statement of Condition"; and ultimately returned the monies to the Plaintiffs and others similarly situated, upon winding up its business. Furthermore, Defendant AGFCTC was insured by the Federal Deposit Insurance Corporation and so advised its out-of-state customers.

In sum, AGFCTC conducted itself in all respects like the financial institution it was, and but for the fact that a customer could not personally transact business by driving or walking to AGFCTC's offices, it was "doing business" with those whom it regarded as its "customers", including Plaintiff and thirty-two other such persons in Oklahoma, just as any other financial institution. Plaintiff received "monthly statements", was required to complete and return a "signature card", deposited his money by mail, and took advantage of a "toll-free" telephone number maintained by AGFCTC for no other purpose than to receive out-of-state customers, as evidenced by the sheer number of such contacts had by AGFCTC from June 1990 through June 1991, above.

As a result of its extensive out-of-state activity it is foreseeable that AGFCTC would be "hailed" into court in a jurisdiction other than California. Indeed, in a Memorandum, dated October 29, 1991 Mr. Dan Leitch, President of AGFCTC wrote:

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[3] *Similar information was also published in the Wall Street Journal, a national publication, a fact judicially noticed by the undersigned.*

> **High risk is associated with customer relations. Some customers will lose certificates with favorable rates in the market with predominantly lower interest rates...Our thrift marketing pieces do not refer to call provisions at all. *This may result in adverse litigation...This is the riskiest section of the withdrawal process and will be mitigated through sensitive customer service and complaint processing*.** (Emphasis added.) "Exhibit D", Appendix to Response to Motion to Dismiss, Volume I, "page 4 of 6".

In sum, AGFCTC's activities are far more significant than a mail-order house or catalog outlet. It set itself up as a financial institution and conducted its business in all respects in that manner. It's contacts were thus "intentional" and were such that it derived significant financial benefit over a long period of time. It's contacts with Oklahoma are, therefore, "substantial", and sufficient to invoke jurisdiction.

c. Conclusion

Upon review of AGFCTC's extensive out-of-state activity, and, given the nature of AGFCTC's business (for all intents and purposes, a financial institution soliciting deposits and accounts from persons across the country), and given the regular correspondence between it and its Oklahoma customers (*i.e., monthly statements*), and given AGFCTC's out-of-state orientation (maintaining a "toll-free 800" telephone number, "faxing" weekly rates to publications outside the state for national distribution), the undersigned finds that AGFCTC's contacts with the State of Oklahoma are sufficient so as to allow the court to exercise *in personam* jurisdiction. AGFCTC has, given the foregoing scenario, "purposefully availed itself of the privilege of conducting business within the State of Oklahoma" and may be hailed into the state as a result. *See, Rambo v. American Southern Insurance Company et al.*, wherein the Tenth Circuit Court of Appeals notes,

> **Certainly, telephone calls and letters may provide sufficient contacts for the exercise of personal jurisdiction. See, Continental Am. Corp. v. Camera**

> Controls Corp., 692 F.2d 1309, 1212-14 (10th Cir. 1982). In proper circumstances, even a single letter or telephone call to the forum state may beet due process standards. See, Burger King, 471 U.S. 475 n.18 ("So long as it creates a 'substantial connection' with the forum, even a single act can support jurisdiction.")...

The character of AGFCTC's contacts, involving creation of a "bank-customer" relationship, with deposit, in this instance of $50,000.00 is sufficient to find that Defendant availed itself of the forum state for purposes jurisdiction.

Minimum contacts being found as regards AGFCTC, such is also the case as regards AGFI.

Accordingly, it is the recommendation of the United States Magistrate Judge that Defendant AGFI's Motion to Dismiss (docket #104) be **denied** as regards the question of personal jurisdiction.

(3) AGFI's Motion to Dismiss First Claim for Relief

AGFI moves to dismiss Plaintiffs' "First Cause", asserting under *Rule 12(b)(6), Federal Rules of Civil Procedure*, that Plaintiffs have failed to state a claim for which relief can be granted. Two issues arise. First, does the complaint adequately plead a claim against AGFI as the "alter ego" or "agent" of AGFCTC? Second, given adequate pleading of "alter ego" or "agency", does the First Amended Complaint state a claim for relief for "fraud, deceit and concealment" as noticed? *(See, First Amended Complaint, at p. 7).*

(a.) Alter Ego

Plaintiffs plead at ¶ (I.) as follows:

> **All of the acts described herein as being done by AGFCTC are imputed in law to AGFI, the parent of AGFCTC...because AGFCTC was the alter ego of AGFI or because AGFCTC was the agent of AGFI, and AGFI did plan, direct, authorize, participate in or ratify such acts at all times pertinent to the**

action.

Under governing Oklahoma law "if one corporation is but an instrumentality or agent of another, corporate distinctions must be disregarded and the two separate entities must be treated..." *Frazier v. Bryan Memorial Hospital Authority*, 775 P.2d 281, 288 (Okla. 1989). "The key is common control of the two entities..." *Tara Petroleum Corp. v. Hughey,* 630 P.2d 1269, 1275 (Okla. 1981).

Federal pleading requires only a "short and plain statement of the claim showing that the pleader is entitled to relief..." *Rule 8(a), Federal Rules of Civil Procedure.*

Paragraph (I.) of Plaintiffs' First Amended Complaint adequately sets forth the allegation of "alter ego", *vis-a-vis* AGFI and AGFCTC, sufficient to meet the requirements of *Rule 8(a).*

(b.) Fraud, Deceit and Concealment

Oklahoma law provides:

> **One who willfully deceives another with the intent to induce him to alter his position to his injury or risk, is liable for any damage he thereby suffers...**76 O.S. (Oklahoma Statutes) §2.
>
> **A deceit within the meaning of the last section is...the suppression of a fact by one who is bound to disclose it...**76 O.S. §3.
>
> **Actual fraud...consists of any of the following acts, committed by a party to a contract with the intent to deceive another or to induce him to enter into the contract**
>
> **(3) The suppression of that which is true, by one having knowledge or belief of the fact...**15 O.S. §58.

Plaintiffs allege, in-part:

> **...[I]t was the intent of the Defendant AGFCTC to deceive and defraud this particular class of persons, and Defendant AGFCTC did deceive and defraud**

by publication of rates.

...[T]hat said Defendant was under a legal duty to speak the truth, ie, to tell the said Plaintiffs that it could not issue a 5-year CD, but could only issue a 5-year TIC which could be redeemed or canceled on 30 day notice.

That instead of speaking the truth as above referred to, the Defendant American General Financial Thrift Company remained silent, cashed the $50,000.00 check...and made a partial disclosure of the significant terms that did not include the redemption provision.

That the suppression of the truth, by the above conduct, with the obvious intent to deceive, was the equivalent of a misrepresentation by the Defendant, made at the time the truth was suppressed...in order to induce the Plaintiffs...to enter into the 5-year TIC that was issued. That the said Plaintiffs were tricked and cheated...

Rule 9, Federal Rules of Civil Procedure requires "all averments of fraud or mistake, the circumstances constituting fraud or mistake...be stated with particularity." Review of the foregoing, and of the First Amended Complaint as a whole leads to the conclusion that the requirements of *Rules 8 and 9* have been satisfied. *(See,e.g., Mangels v. Pena,* 789 F.2d 836, 837 (10th Cir. 1986) to the effect that "*a complaint may not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief...The pleadings must be liberally construed...and all well-pleaded allegations accepted as true.*" *See also, Lessman v. McCormick,* 591 F.2d 605, 607-08 (10th Cir. 1979) which holds "*[t]he allegations must be taken at face value and construed most favorably to the pleader.*")

Defendant's allegation that it was under no duty to disclose the information is a question of fact, particularly given the telephonic contact alleged as between Plaintiffs and Defendant's employee wherein the arrangements for opening an account were made.

Accordingly, applying the foregoing principles, the undersigned finds that Plaintiffs have stated a claim under governing Oklahoma law, and that Defendant's Motion should be denied.

(4) AGFI's Motion to Dismiss Second Claim for Relief

Plaintiffs' "Second Cause of Action" seeks relief asserting breach of contract between Plaintiffs and Defendant AGFI. The foregoing discussion regarding "alter ego" and federal notice pleading need not be repeated again.

Applying those standards, the undersigned finds as follows:

1. Sufficient allegations are pled in the First Amended Complaint *(at p. 12)* to state a claim for breach of contract under Oklahoma law.
2. Defendant's invocation of "mutual mistake" is a question of fact.
3. Applying the law of "alter ego", *supra*, sufficient cause has been pled as against AGFI.

Accordingly, AGFI's Motion to Dismiss Plaintiffs' "Second Cause of Action" should be denied.

(5) AGFI's Motion to Dismiss Third Claim for Relief

Plaintiffs seek further relief against AGFI for "tortious breach of contract", alleging that "[t]he issuance instead, of a 5-year TIC[4]...was a deliberate, designed and intentional breach of their contract, and a tort occurred when the said 5-year TIC was canceled." *First Amended Complaint, at ¶ (e.), p. 15.)*

[4] *Instead of a "CD" as allegedly promised.*

In *Rodgers v. Tecumseh Bank,* 756 P.2d 1223 (Okla. 1988) the Oklahoma Supreme Court refused to extend the concept of tortious breach of contract to commercial contracts other than insurance contracts. The contract at issue here is not an insurance contract, hence is not subject to the cause of action pled.

Accordingly, the undersigned finds that Defendant AGFI's Motion to Dismiss should be granted as against Plaintiffs' "Third Cause of Action".

(6) AGFI's Motion to Dismiss Fourth Claim for Relief

Plaintiffs allege that

> "FRI, by its December 17, 1990 publication...induced the Plaintiffs...to purchase a 5-year CD from Defendant AGFCTC by creating the false impression in Plaintiffs' minds that the Defendant AGFCTC marketed a 5-year CD...at a stated rate..." First Amended Complaint at p.17, ¶ (a.).

Plaintiffs further allege that

> The Defendant AGFCTC confirmed the above mentioned false impression by accepting and cashing a $50,000.00 check... Id. at ¶ (b.).

Plaintiffs go on to state

> "[t]he conduct of the Defendant AGFCTC and AGFI in confirming the said false impression was wrongful and tortious under 15 OSA § 58, 76 OSA §§ 1-3...because when Defendant AGFCTC confirmed the false impression, this conduct was the equivalent to having made the representation which created the false impression. Id. at p. 18, ¶ (d.).

Plaintiffs have, as of February 5, 1993 filed their Stipulation for Dismissal of Causes on Financial Rates, Inc. seeking dismissal of their "Fourth" and "Fifth" "causes of action" against Financial Rates, Inc. Given this, argues AGFI, the claim against AGFI should also fall. Plaintiffs note that liability is joint and several for a fraud claim brought under Oklahoma law.

Close reading of the whole of the First Amended Complaint reveals a distinction drawn between conduct alleged to be wrongful in Plaintiffs' first claim and that as alleged in their fourth claim.

Applying the pleading requirements, set forth above, and adopting once again the statement of law regarding "alter ego", the undersigned finds that Plaintiffs having dismissed FRI have simply restated their "First Cause of Action".

Accordingly, the undersigned finds that Defendant AGFI's Motion to Dismiss should be granted as regards the "Fourth Cause of Action".

(7) AGFI's Motion to Dismiss Sixth and Seventh Claims for Relief

Plaintiffs plead causes of action arising under 15 U.S.C. §1125 *et seq. the "Lanham Act")*. It is unnecessary to delve in great detail into the particular allegations made, given that Defendant's Motion to Dismiss may be resolved by simple review of extant case law construing the scope of §1125 *et seq.*

While Defendants state that "overwhelming case law...make it clear that the Lanham Act afford[s] remedies only for commercial plaintiffs...and not to consumer purchasers" in fact there is an opposing body of case law to the contrary. However, the issue is framed by the recent decision voiced in Shonac Corp. v. AMKO International, 763 F.Supp. 919, 929 (S.D. Ohio 1991), where the court directly addressed the question of standing. Noting that the court in *Colligan v. Activities Club of New York*, 442 F.2d 686 (2nd Cir. 1971) held that consumers lack standing to sue under §43(a), the court examined the holding in *Rare Earth, Inc. v. Hoorelbeke*, 401 F.Supp. 26, 39 (S.D.N.Y. 1975). In *Rare Earth* the court explained that "a plaintiff must possess a sufficient nexus with the alleged wrongful

conduct in order to have standing under §43(a). The *Shonac* court further noted that five circuits have adopted the "reasonable interest" [to be protected against false advertising] test set out in *Rare Earth*.

Applying this standard to the instant case would yield a result which allows Plaintiffs to proceed with their Lanham Act claim; Plaintiffs indeed having a "reasonable interest" to be protected against the false advertising they claim was perpetrated by Defendants herein. As consumers, they claim they were misled to believe they were purchasing a "Certificate of Deposit" instead of a "Thrift Investment Certificate", and would not have so acted had they been properly informed. Specifically, Plaintiffs point to the information in "100 Highest Yields" as being the offending consumer-oriented data promoted ("confirmed") by Defendants AGFI and AGFCTC (who allegedly knew of the categorization by the publication), but who took no corrective steps, continuing, instead, to send weekly rate information to the publication.

Notwithstanding these allegations, the undersigned finds persuasive the holding in *Shonac* to the effect that some form of competition is required in order to invoke standing under the Lanham Act. Specifically, the court points to the Act itself:

> **The final section of the Lanham Act -- in a passage unusual, and extraordinarily helpful, in declaring in so many words the intent of Congress -- states that "the intent of this chapter is to regulate commerce within the control of Congress...to protect persons engaged in such commerce against unfair competition.**(Emphasis added.) *Shonac* at 763 F.Supp. 932; citing Halicki v. United Artists Communications, Inc., 812 F.2d 1213, 1214-15 (9th Cir. 1987).

Given the persuasive evidence of the purpose of §43(a) as set forth in Congress' unambiguous statement that the Act is meant to "protect persons engaged in...commerce

against unfair competition", the undersigned finds that an interpretation of the plain words "unfair competition" which does not require competition is inconsistent with the obvious legislative intention.

As Plaintiffs are plainly not competitors, they have no standing under the Lanham Act. Accordingly, the undersigned recommends that Defendant AGFI's Motion to Dismiss should be **granted** as regards the "Sixth and Seventh Causes of Action".[5]

(8) AGFI's Motion to Dismiss Eighth Claim for Relief

Plaintiffs' Eighth "Cause of Action" sounds in equity, seeking to impose a constructive trust upon assets transferred to AGFI from AGFCTC. Defendant moves to dismiss, merely repeating the words of *Rule 12(b)(6),* and offers no authority to support its Motion. Clearly, the equitable remedy sought is available given a finding that AGFI is in fact, and as a matter of law, the "alter ego" of AGFCTC.

Accordingly, Defendant's Motion to Dismiss the "Eighth Cause of Action" should be **denied.**

(9) Summary

It is the recommendation of the United States Magistrate Judge that Defendant AGFI's Motion to Dismiss be **denied** as follows:

(a). As to the question whether the First Amended Complaint was untimely filed;

(b). As to the question of personal jurisdiction;

(c). As to Plaintiffs' "First Cause of Action";

(d). As to Plaintiffs' "Second Cause of Action"; and

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[5] *Perhaps a different result would ensue would the Plaintiffs be joined by other would-be Oklahoma claimants, who are said to be businesses and even financial institutions. The issue of competition would be far easier to address in that context.*

(e). As to Plaintiffs' "Eighth Cause of Action".

It is the further recommendation of the United States Magistrate Judge that Defendant AGFI's Motion to Dismiss be **granted** as follows:

(f). As to Plaintiffs' "Third Cause of Action";

(g). As to Plaintiffs' "Sixth Cause of Action" ; and

(h). As to Plaintiffs' "Seventh Cause of Action".

Any objections to this Report and Recommendation must be filed with the Clerk of Courts within ten (10) days of the receipt of this notice. Failure to file objections within the specified time waives the right to appeal the District Court's order.[6]

Dated this 4th day of Oct., 1993.

JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

[6] *See Moore v. United States of America, 950 F.2d 656 (10th Cir. 1991).*

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FRED MARVEL, ET AL	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	92-C-0206-B
	)	
AMERICAN GENERAL FINANCIAL CENTER THRIFT CO., ET AL	)	
	)	
Defendants	)	

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE REGARDING DEFENDANT AGFCTC'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This report and recommendation addresses Defendant American General Financial Center Thrift Company's Motion for Partial Summary Judgment (docket #46), which asks that summary judgment be granted as against Plaintiffs' "Third Cause of Action", as same is now stated in Plaintiffs' First Amended Complaint.[1]

Plaintiffs seek relief against American General Financial Center Thrift Company ("AGFCTC") for "tortious breach of contract", alleging that **"[t]he issuance instead, of a 5-year TIC[2]...was a deliberate, designed and intentional breach of their contract, and a tort**

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[1] *While the Motion originally went to Plaintiffs' first filing, the filing of the First Amended Complaint supersedes that original Complaint. Same is the subject of an earlier filed Report and Recommendation, finding that Plaintiffs were entitled as of right to file the First Amended Complaint, the filing coming as it did prior to any ruling by the Court on pending motions to dismiss. In any event, the cause as stated in the First Amended Complaint is the same as is originally set forth.*

[2] *Instead of a Certificate of Deposit ("CD") as is alleged to have been promised or represented.*

occurred when the said 5-year TIC was canceled." First Amended Complaint, *at ¶ (e.), p. 15.)*

In *Rodgers v. Tecumseh Bank,* 756 P.2d 1223 (Okla. 1988) the Oklahoma Supreme Court refused to extend the concept of tortious breach of contract to commercial contracts other than insurance contracts. The contract at issue here is not an insurance contract, hence is not subject to the cause of action pled.

There is no genuine issue of material fact as regards the question, as there is no dispute regarding the nature of the instrumentality purchased, or, the Defendant's subsequent handling of that instrument.[3] This was not an insurance agreement, but rather, an agreement to accept monies at a stated rate. The dispute between the parties centers on the alleged misrepresentation made regarding the nature of the instrument *(i.e., a "CD" or "TIC")* and whether in providing a TIC, and then redeeming the instrument before the expiration of five (5) years, Defendant breached a contract to provide a CD, or a rate of interest, in effect, guaranteed for five (5) years?

Given the foregoing, and given the status of the cause of action under Oklahoma law regarding tortious breach of contract, the undersigned recommends that Defendant AGFCTC's Motion for Partial Summary Judgment (docket #46) be **granted.**

Any objections to this Report and Recommendation must be filed with the Clerk of Courts within ten (10) days of the receipt of this notice. Failure to file objections within the specified time waives the right to appeal the District Court's order.[4]

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[3] *Approximately a year later, AGFCTC redeemed the TIC and returned Plaintiffs' funds to them.*

[4] *See Moore v. United States of America, 950 F.2d 656 (10th Cir. 1991).*

Dated this 1ST day of Oct., 1993.

JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DOLORES L. FITZGERALD,

Plaintiff,

vs.

PHOENIX MUTUAL LIFE INSURANCE COMPANY,

Defendant.

Case No. 93-C-565-B

DISMISSAL WITH PREJUDICE

Now on this 4th day of Oct., 1993, comes on for hearing the Joint Application for Dismissal with Prejudice. The Court being fully advised in the premises,

IT IS ORDERED that this action shall, and it hereby is, DISMISSED WITH PREJUDICE.

District Judge

NOTE: THIS ORDER [illegible] AND

ENTERED ON DOCKET

DATE 10-4-93

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHAPARRAL CREEK, LTD., STONEBROOK, LTD., AND PCA-THE LODGE LIMITED PARTNERSHIP,	)	FILED
Plaintiffs,	)	OCT 01 1993
v.	)	Richard M. Lawrence, Clerk U. S. DISTRICT COURT NORTHERN DISTRICT OF OKLAHOMA
E-CHAPARRAL ASSOCIATES LIMITED PARTNERSHIP, E-STONEBROOK ASSOCIATES, and E-LODGE ASSOCIATES LIMITED PARTNERSHIP,	)	
Defendants.	)	Case No. 93-C-679 E

ADMINISTRATIVE CLOSING ORDER

IT APPEARING these proceedings should be held in abeyance pursuant to the settlement and compromise effected by the parties, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation. If within One Hundred and Twenty (120) days hereof, the parties have not reopened for the purpose of obtaining such a final determination, this action will be deemed to be dismissed with prejudice.

IT IS SO ORDERED this 1st day of ~~September~~ October, 1993.

S/ JAMES O. ELLISON

Hon. James O. Ellison
Chief United States District Judge

DLK-2027

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FRANK C. ERVIN, JR.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 92-C-453-E
	)	Cons. 92-C-545-E
BUCK JOHNSON, et al.,	)	Cons. 92-C-471-E
	)	
Defendants.	)	

O R D E R

This action came on for hearing before the Court, the Honorable James O. Ellison, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered in favor of Defendants,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of Defendants, with each party to bear its own costs, and that the action be dismissed on the merits.

ORDERED this 23d day of September, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

44 15 22

IN E UNITED STATES DISTRICT JRT
FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FEDERAL DEPOSIT INSURANCE CORPORATION, in its corporate capacity,	)	
Plaintiff,	)	
vs.	)	Case No. 91-C-140-B
BILL L. HARRIS and CAROLYN B. HARRIS,	)	
Defendants.	)	

STIPULATION OF DISMISSAL

Plaintiff Federal Deposit Insurance Corporation, in its corporate capacity, and Defendants Bill L. Harris and Carolyn B. Harris hereby file their Stipulation of Dismissal of the above entitled cause, without prejudice, each party to bear its own costs and attorneys' fees.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF
FEDERAL DEPOSIT INSURANCE CORPORATION

and

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ATTORNEY FOR DEFENDANTS
BILL HARRIS AND CAROLYN HARRIS

BKB\#2B\Harris.Bill\Stipulation.Dis

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KATHRYN ARMER,)
)
Plaintiff,)
)
vs.) Case No. 92-C-568-B
)
UNITED STATES OF AMERICA,)
)
Defendant.)

O R D E R

Now before the Court, for its consideration, is the motion for summary judgment by the Defendant, United States of America (Docket #22), filed on June 14, 1993.

Statement of Undisputed Facts

The Plaintiff, Kathryn Armer (Mrs. Armer), fell on the steps of the United States Post Office, in Bristow, Oklahoma, on November 9, 1989. Plaintiff submitted a claim to the United States Postal Service on November 6, 1991, and amended that claim on December 19, 1991. Plaintiff's claim was denied on January 3, 1992. Plaintiff alleges in her complaint that the Defendant was negligent in two respects: first, in allowing an oily substance to be on the steps, and second, in failing to have an intermediate handrail down the middle of the steps, in addition to the handrail on each side of the steps. Plaintiff asserts that she observed an oily substance on the steps subsequent to her fall. She also asserts that a post office employee examined the steps after her fall, admitted that an oily substance was present, and requested that another employee

clean up the substance.[1] A.J. Mayes, a postal employee, inspected the accident site, and noted that there were several discolored spots on the steps, although no oil could be felt on the steps and there were no leaves, dirt, or moisture present. Mayes statement neither admits nor denies Plaintiff's allegation that ~~he~~ spoke to her at that time.

Plaintiff admits that there were handrails on the outside of the stairs at the time of the accident. Defendant admits that there was no center rail on the steps at the time of the accident. It is undisputed that Vera Turner slipped and fell on the steps several months previous to Plaintiff's accident, and that she was holding onto the rail at the time her accident occurred.

Defendant requests summary judgment on Plaintiff's claim regarding an oily substance on the steps on the grounds that Plaintiff has no evidence to corroborate her claim that any such substance was present, and that the Plaintiff's own testimony is insufficient to support her claim. Defendant also contends it is entitled to summary judgment on Plaintiff's claim regarding the handrail because, as a matter of law, the lack of a center handrail could not have proximately caused the accident, and because the installation of a handrail is a discretionary function over which this Court does not have jurisdiction.

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[1] In her deposition, Plaintiff was only able to identify this employee as "black" and "a supervisor". In a subsequent affidavit, Plaintiff states she believes the employee she spoke to is A.J. Mayes. Defendant admits that it has an employee, A.J. Mayes,but points out that Mr. Mayes is not black.

Legal Analysis

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Windon Third Oil & Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

> "The plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986).

Oily Substance On The Steps

Defendant first requests summary judgment on Plaintiff's claim that the steps were deceptively dangerous due to an "oily substance" which caused Plaintiff to slip and fall. Defendant argues that Plaintiff's testimony that she felt an oily substance on the steps is inadequate to support her claim and prevent summary judgment. Plaintiff counters with an affidavit that the postal employee who inspected the steps after her fall, A.J. Mayes, agreed with her that the steps were oily and instructed another employee

to clean them. Mayes disputes this statement and claims that the steps were clean and dry. Examining the facts in the light most favorable to Plaintiff, and assuming that Mayes did agree that an oily substance existed on the steps, the question remains whether the evidence adduced by Plaintiff is adequate to support a claim that the steps were deceptively dangerous.

Before liability will be imposed on a business establishment for an injury to a customer, it must be shown that the condition causing the fall had been negligently created by the owner, or had existed for such a period of time that the owner knew or should have known of the condition. Harper v. Levine's, Inc., 435 P.2d 127 (Okla. 1967). Based on Plaintiff's testimony, there is insufficient evidence to infer that the presence of the "oily substance" discovered by Plaintiff was in any way caused by Defendant. Joy v. S.H. Kress and Company, 386 P.2d 148,150 (Okla. 1963). Further, Plaintiff's argument that a previous slip and fall accident involving Vera Turner put the Defendant on notice of the dangerous condition of the steps is unavailing. There is no evidence that Vera Turner, or anyone else, fell because of an oily substance on the steps. In this respect, Plaintiff is requesting that the Court make inferences that are not supported by any competent evidence. Plaintiff's evidence is not sufficient to support this claim, and therefore Summary Judgment should be and is hereby GRANTED on Plaintiff's "oily substance" claim.

Failure to Install Handrail

Plaintiff also alleges the steps were deceptively dangerous

due to the lack of a third handrail down the center of the steps. Defendant argues that the decision not to install handrails was a discretionary one, and therefore a claim based on this decision does not fall within the provisions of the Federal Tort Claims Act, 28 U.S.C. §2671, and thus, this court lacks jurisdiction over it. An exception to the waiver of sovereign immunity is found at 28 U.S.C. §2680, which provides in relevant part as follows:

> The provisions of this chapter and section 1346(b) of this title shall not apply to-
>
> (a) Any claim ... based on the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused....

The determination of whether an act is discretionary involves a two prong test: (1) whether the challenged conduct involves an element of judgment or choice; and (2) whether the action was based on considerations of public policy. Berkowitz v. United States, 486 U.S. 531, 536-37, 108 S.Ct. 1954, 1958-59.

"A discretionary act is one that involves choice or judgment; there is nothing in that description that refers exclusively to policymaking or planning functions." United States v. Gaubert, 499 U.S. 315, 111 S.Ct. 1267,1275 (1991). An act does not involve judgment or choice if it involves "a federal statute, regulation, or policy [that] specifically prescribes a course of action for an employee to follow." Berkowitz, at 1958. Therefore the first question is whether a specific regulation exists which requires the installation of a third handrail. Plaintiff argues that regulations of both The Occupational Safety and Health Administration (OSHA),

29 C.F.R. §1910.23, and the Southern Standard Building Code require that stairways in excess of 88 inches wide have an intermediate handrail. Defendant does not dispute that the stairway in question is in excess of 88 inches wide, but rather argues that the requirements of OSHA and the Southern Standard Building Code are inapplicable to a United States Post Office.

The provisions of section 19 of the Occupational Safety and Health Act of 1970, 29 U.S.C. §668, are applicable to the Postal Service[2] and they provide as follows:

> It shall be the responsibility of the head of each Federal agency to establish and maintain an effective and comprehensive occupational safety and health program which is consistent with the standards promulgated under section 655 of this title. The head of each agency shall (after consultation with representatives if the employees thereof)-
>
> (1) provide safe and healthful places and conditions of employment, consistent with the standards set under section 655 of this title;
>
> (2) acquire, maintain, and require the use of safety equipment, personal protective equipment, and devices reasonably necessary to protect employees;
>
> (3) keep adequate records of all occupational accidents and illnesses for proper evaluation and necessary corrective action;
>
> (4) consult with the Secretary with regard to the adequacy as to form and content of records kept pursuant to subsection (a)(3) of this section; and
>
> (5) make an annual report to the Secretary with respect to occupational accidents and injuries and the agency's program under this section. Such report shall include any report submitted under section 7902(e)(2) of Title 5.

Nothing in the express language of this quoted §19 makes the regulations found at 29 C.F.R. §1910 applicable to the Postal

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[2] 39 U.S.C. §410(b)(7)

Service, or any other governmental agency.

Similarly, the requirements of the Southern Standard Building Code are not directly applicable to the Postal Service. Standard building codes have been adopted by the federal government in the Public Buildings Amendment Act of 1988, 40 U.S.C. §619, and by the state of Oklahoma through Okla.Stat.Ann.tit. 74, §324.11. However, each of these statutes provide that they only apply to buildings constructed or altered after the effective date of the statute, 1988 and 1965, respectively. It is undisputed that the United States Post Office in Bristow was constructed prior to 1965. Further, it is not contended by either party that the building has been altered since that time. The act of the Postal Service in not installing an intermediate handrail, was one of choice, not in violation of an established statute, rule, or regulation, and was therefore discretionary.

The second question is whether the action or decision was based on public policy. Defendant, in this case, maintains that the decision not to install intermediate handrails was made while balancing the policy interest of safety with the policy interest of preservation of an historical building. The balancing of these policies is supported by the Postal Service's Realty Acquisition and Management Handbook[3] and its Supervisor's Safety Handbook[4]. Moreover, it is to be presumed that acts exercising proper

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[3] This handbook recognizes a policy and an "obligation to preserve and protect" historic postal properties.

[4] This manual sets forth a safety and health program objective of "[m]aintaining safe and healthful working conditions."

discretion are grounded in policy. Gaubert, 111 S.Ct. at 1274. The inquiry is whether the actions taken are susceptible to a policy analysis. Id. In the present case, the act of not installing an intermediate handrail is susceptible to a policy analysis of preserving an historical building. For these reasons, ~~Def~~endant's motion for summary judgment on Plaintiff's claim arising from the failure to install an intermediate handrail should be and is hereby GRANTED.

IT IS SO ORDERED THIS 30th DAY OF SEPTEMBER, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KATHRYN ARMER,

Plaintiff,

vs.

UNITED STATE OF AMERICA,

Defendant.

Case No. ~~92~~-C-568-B

J U D G M E N T

In accord with the Order filed this date sustaining the Defendant's Motion for Summary Judgment, the Court hereby enters judgment in favor of the Defendant, United States of America, and against the Plaintiff, Kathryn Armer. Plaintiff shall take nothing of its claim. Costs are assessed against the Plaintiff, if timely applied for under Local Rule 6, and each party is to pay its respective attorney's fees.

Dated, this 30th day of September, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SHANNON SMITH, an individual, Plaintiff, and DAVID TAN, an individual, as Intervenor and Co-Plaintiff,

Plaintiffs,

vs.

WILLIAM ENGLERTH, an individual; HEAVY DUTY TRUX, LTD., a foreign corporation; COMMONWEALTH GENERAL INSURANCE COMPANY, a foreign corporation,

Defendants and Third-Party Plaintiffs,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Third-Party Defendant.

Case No. 93-C-0047 B

ORDER

THIS MATTER comes before the Court on the Application of the Plaintiff/Intervenor, DAVID LYE TAN, and Defendant, WILLIAM ENGLERTH. The Court finds that all of the issues between these two parties have been completely settled and compromised, and therefore dismisses the cross-claim filed by Defendant, WILLIAM ENGLERTH, against the Plaintiff/Intervenor, DAVID LYE TAN, with prejudice as to any future actions.

SO ORDERED this 30th day of September, 1993.

U.S. DISTRICT JUDGE

JAG:pm/9/16/93/5248.93

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KIRK W. LEMMON,

Plaintiff,

V.

JOHN WESLEY JOHNSON, Individually and/or as a Police Officer; DEPUTY THOMPSON, Individually and as a Police Officer; SHERIFF STANLEY GLANZ and CITY OF TULSA and COUNTY OF TULSA and DOES I-X, INCLUSIVE

Defendants.

CASE NO. 90-C-~~697~~-B

O R D E R

This matter comes on for consideration of Defendants', Sheriff Stanley Glanz, the County of Tulsa, and John Wesley Johnson, Appeal of Magistrate's Order (docket # 116) filed June 15, 1993. Defendants contend they filed a timely appeal (docket #44) to the Magistrate's Discovery Order entered on October 22, 1991 (docket # 38). Defendants further contend that at a status conference before the Magistrate on January 27, 1992, counsel advised the Magistrate that a ruling on their pending objection to his discovery order had not been forthcoming. Defendants made inquiry by letter dated June 11, 1993, as to the pending discovery appeal and were advised a minute order entered was entered on January 27, 1992, stating that Defendants' Objection to the Magistrate's discovery order was moot.

Defendants dispute the minute order, contending inadvertent error occurred in its entry. The Court has listened to an audio

transcription of the January 27, 1992 status conference and concludes the minute of same date is in error as alleged by Defendants. Therefore the minute entry and order as to docket #44 is vacated.

The Court next considers Defendants appeal of the Magistrate's discovery order. Defendants originally sought Plaintiff's medical records relating to drug and/or alcohol rehabilitation for two years prior to and after the alleged excessive force incident.[1] Defendants alleged in their original appeal (#44) that the Magistrate indicated at an October 15, 1991 discovery conference that Plaintiff would be required to release such records for a six month period prior to the alleged incident, but nothing following the incident. However, on October 21, 1991, the Magistrate entered an order stating that "Plaintiff's psychiatric records from Tulsa Regional Medical Center will not be released to Defendants."

The pleadings indicate there were no psychiatric records of Plaintiff in the six month period prior to the incident, which allegedly occurred on November 1, 1989, and that Plaintiff's TRMC psychiatric records related to a period (February, 1991) more than one year past the alleged event. Defendants urge a need for such records to accord with a theory that persons who are substance abusers suffer periods of black-out wherein memory is impaired.

The Court concludes Plaintiff's psychiatric records from Tulsa Regional Medical Center for the two year period following the alleged event shall be released to the Defendants. Such psychiatric

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[1] Specifically Plaintiff's psychiatric records from Tulsa Regional Medical Center.

records shall be made available to counsel for Defendants and used exclusively as may be relevant to the instant action, not being communicated to any third party unrelated to the instant case and shall be returned to Plaintiff at the conclusion of this case.

Defendants' Appeal of and Objection to the Magistrate's Order (dockets #44 and#116) shall be and the same are herewith SUSTAINED.

IT IS SO ORDERED this 30 day of September, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE